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By HOWARD L. VICKERY III*

Direct judicial review of informal administrative action in the field of securities regulation is a recent phenomenon. In the pioneering opinion *Medical Committee for Human Rights v. SEC*,[1] the Court of Appeals for the District of Columbia Circuit, held that a decision by the commission to affirm a Securities Exchange Commission staff recommendation that no action be taken to force Dow Chemical to include a shareholder proposal in its proxy materials had the earmarks of a formal order reviewable in the court of appeals. Subsequently, the same circuit in *National Automatic Laundry and Cleaning Council v. Shultz*[2] held that an informal interpretation of the Fair Labor Standards Act issued by the wage and hour administrator was reviewable in the district courts under the Administrative Procedure Act. The court stated, however, that informal *staff* interpretations of the act were not reviewable under the APA. In *Kixmiller v. SEC*,[3] the District of Columbia Circuit returned to the problem of direct review of shareholder proposal no-action letters. The court held that it lacked jurisdiction to review a no-action recommendation by the SEC staff where the commission refused to review or to comment upon the determination made by its staff. From a pragmatic viewpoint, this result is disturbing because there appears to be little practical difference between a decision made by the SEC staff not to intervene on behalf of a shareholder and a no-action decision approved by the commission itself.

When the dust settled from the first set of opinions extending direct judicial review to informal agency actions, the following results

* B.A., 1970, Swarthmore College; M.A., 1971, University of California at Berkeley; J.D., 1975, University of Chicago; member of the California Bar.

1. 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).
2. 443 F.2d 689 (D.C. Cir. 1971).
3. 492 F.2d 641 (D.C. Cir. 1974).

became evident. First, informal action by the head of an agency is presumptively reviewable in two courts: in the district courts under the Administrative Procedure Act or, where applicable, in the appellate courts under a standard review provision found in many of the administrative acts. Second, informal staff action is not subject to direct review, even though the bulk of informal agency action is accomplished by subordinates. Third, informal staff action can have severe practical consequences for affected parties. Finally, the dichotomy between staff action and action by the head of the agency enables an agency to avoid judicial review by having decisions made at the staff level.

This article will suggest that the District of Columbia Circuit, in a well-intentioned effort to extend direct judicial review to informal administrative action, started off on the wrong foot in *Medical Committee*.[4] The court distorted both the law and the nature of a shareholder proposal no-action letter in order to find that it qualified as an order reviewable in the court of appeals under section 25(a) of the Securities Exchange Act of 1934.[5] In fact, section 25(a) and similar review provisions in other administrative acts[6] are reserved for formal administrative actions, which in most cases involve the performance of quasi-judicial functions by the administrative body. Informal administrative action, in the author's view, should be exclusively reviewed in the district courts under the Administrative Procedure Act. This article will also take issue with the ruling in *National Automatic Laundry*[7] that informal staff action is automatically unreviewable. The courts would

4. 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

5. "A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals . . . by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part." 15 U.S.C. § 78y(a)(1) (Supp. V, 1975).

6. Section 25(a) is similar to the statutory provisions for petitions for review to the court of appeals contained in the Federal Trade Commission Act, 15 U.S.C. § 45(c) (1970); the Securities Act of 1933, 15 U.S.C. § 77i (1970); the Public Utilities Holding Company Act, 15 U.S.C. § 79x (1970); the Natural Gas Act, 15 U.S.C. § 717r(b) (1970); the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 371(f) (1970); the Federal Alcohol Administration Act, 27 U.S.C. § 204(h) (1970); the National Labor Relations Act, 29 U.S.C. § 160(f) (1970); the Fair Labor Standards Act of 1930, 29 U.S.C. § 210(a) (Supp. V, 1975); the Federal Communications Act, 47 U.S.C. § 402(b) (1970); the Federal Aviation Act, 49 U.S.C. § 1486 (1970); and at least ten additional statutes. *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 23.03 (1958 & Supp. 1970) [hereinafter cited as DAVIS]. Consequently, in construing section 25(a) of the Securities Exchange Act, a court should look to cases arising under related review provisions in other administrative statutes.

7. 443 F.2d 689 (D.C. Cir. 1971).

be better advised to focus upon the practical effect of informal staff action rather than the level at which administrative action is taken. The standard ripeness tests,[8] when applied to informal staff action, are sufficient to protect the administrative agencies from premature and excessive interference by the courts.

I. Background

A. SEC Procedure for Handling Disputed Shareholder Proposals

Section 14(a)[9] of the Securities Exchange Act of 1934 prohibits the solicitation of proxies in contravention of the rules and regulations prescribed by the SEC. In 1942, the SEC promulgated its first full-fledged shareholder proposal rule under this section. The rule required corporate management "to include in its proxy statement any shareholder proposal which was 'a proper subject for action by the security holders.' "[10] If management intended to oppose the security holder's proposal, the proxy materials had to contain a one hundred-word statement by the shareholder in favor of his proposal.

Originally, it was thought that the criteria for determining the proper subject for shareholder consideration criteria could be found solely by reference to state law. State law on the topic, however, proved scanty,[11] and the SEC began to develop its own law defining appropriate areas for shareholder action. Now, rule 14a-8(c) incorporates five detailed exceptions to the general requirement that management include shareholder proposals in its proxy materials.[12] The SEC has

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8. See text accompanying notes 178-86 *infra.*

9. 15 U.S.C. § 78n (1970).

10. Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 677, *quoting* 7 Fed. Reg. 10,659 (1942).

11. *See* Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 677; 2 L. Loss, SECURITIES REGULATION 905-06 (2d ed. 1961) [hereinafter cited as Loss].

12. 17 C.F.R. § 240.14a-8(c) (1976). Shareholder proposals may be omitted from the management's proxy materials under any of the following circumstances:

"(1) If the proposal as submitted is, under the laws of the issuer's domicile, not a proper subject for action by security holders; or

(2) If the proposal:

(i) Relates to the enforcement of a personal claim or the redress of a personal grievance against the issuer, its management, or any other person, or

(ii) Consists of a recommendation, request, or mandate that action be taken with respect to any matter, including a general economic, political, racial, religious, social, or similar cause, that is not significantly related to the business of the issuer or is not within the control of the issuer; or

(3) If the management has at the security holder's request included a proposal in its proxy statement and form of proxy relating to either of the last two annual meetings

also recently released for public comment proposed revisions of rule 14a-8 which would expand the number of exceptions to thirteen.[13]

As its substantive law governing shareholder proposals grew, the SEC found it necessary to adopt rules establishing a procedure for determining when it would bring an enforcement action if management refused to include a shareholder's proposal in the proxy materials on the grounds that the proposal came under one of the exceptions of rule 14a-8(c). Under this procedure, management, when it believes a proposal is of a type that may legally be omitted, is required to file with the SEC a copy of the shareholder's proposal, his supporting statement, a statement of reasons why management believes that the omission of the proposal is proper, and, if these reasons are based on a matter of law, the supporting opinion of counsel.[14] The burden of proof is on management to establish that a particular shareholder's proposal is not a proper one for inclusion in management's proxy materials.[15]

When a dispute over the omission of a shareholder's proposal is submitted to the SEC, it is initially considered by the Division of Corporate Finance.[16] The shareholder is permitted to file his arguments

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of security holders or any special meeting held subsequent to the earlier of such two annual meetings and such security holder has failed without good causes to present the proposal, in person or by proxy, for action at the meeting; or

(4) If substantially the same proposal has previously been submitted to security holders in the management's proxy statement and form of proxy relating to any annual or special meeting of security holders held within the preceding 5 calendar years, it may be omitted from the management's proxy material relating to any meeting of security holders held within the 3 calendar years after the latest such previous submission: *Provided*, That—

(i) If the proposal was submitted at only one meeting during such preceding period, it received less than 3 percent of the total number of votes cast in regard thereto; or

(ii) If the proposal was submitted at only two meetings during such preceding period, it received at the time of its second submission less than 6 percent of the total number of votes cast in regard thereto; or

(iii) If the proposal was submitted at three or more meetings during such preceding period, it received at the time of its latest submission less than 10 percent of the total number of votes cast in regard thereto; or

(5) If the proposal consists of a recommendation or request that the management take action with respect to a matter relating to the conduct of the ordinary business operations of the issuer." *Id.*

13. Proposed Amendments to Rule 14a-8 under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Exchange Act Release No. 12598 (July 7, 1976), [Current] CCH FED. SEC. L. REP. ¶ 80,634 [hereinafter cited as Proposed Amendments].

14. 17 C.F.R. § 240.14a-8(d) (1974).

15. 19 Fed. Reg. 246 (1954).

16. 17 C.F.R. § 200.18 (1974).

in favor of including his proposal, although there is no explicit provision in the proxy rules for shareholder participation.[17] The staff evaluates the arguments submitted by the shareholder and the company and decides whether or not to recommend enforcement action to the commission. If the staff decides not to recommend enforcement, the practice has been to notify the management in a terse "no-action" letter which does not illuminate the reasoning behind the determination. The staff recommendation may be appealed to the commission by the protesting shareholder, but review by the commission is discretionary.[18]

The SEC has given its official view of shareholder proposal no-action letters and the shareholder proposal review process in its *Statement of Informal Procedures for the Rendering of Staff Advice with Respect to Shareholder Proposals.*[19] The SEC emphasizes that its staff must review a large number of proxy materials each year.[20] Given the limited size of its staff and the need for rapid examination, the staff cannot subject the proxy materials to a detailed analysis.[21] Consequently, the review process itself is informal and the commission and its staff do not purport to issue rulings or decisions which definitively determine whether particular proxy material complies with the proxy rules.[22] No-action letters and letters of comment are issued solely to provide guidance as to the staff's enforcement views to assist management and proponents in complying with the proxy rules.[23] Neither the shareholder nor management is bound by the agency's advice.[24] The shareholder is free to bring a private action to force management to include his proposal even though the SEC has indicated that it will take no action if the proposal is omitted from the proxy materials.[25]

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17. *See* Proposed Amendments, *supra* note 13, ¶ 80,635, at 86,605.

18. *See* 17 C.F.R. § 202.1(d) (1974); Kixmiller v. SEC, 492 F.2d at 641, 645.

19. Exchange Act Release No. 12,599 (July 7, 1976), [Current] CCH FED. SEC. L. REP. ¶ 80,635, at 86,602-06 [hereinafter cited as Statement of Informal Procedures].

20. *Id.* at 86,604. The agency states that it reviewed 6,700 proxy statements in fiscal 1974 as a basis for asserting that its shareholder proposal no-action letters are merely advisory and not a definitive determination of whether a particular filing complied with the proxy rules. Actually, only 161 proposals were omitted from the proxy statements of 71 companies. One of the most common grounds for omission was that the proposals were not submitted in time. Consequently, the SEC staff does have time to analyze adequately whether management has a legal right to omit a shareholder proposal under the proxy rules. *See* 40 SEC ANN. REP. 33 (1974).

21. Statement of Informal Procedures *supra* note 19 at 86,604.

22. *Id.*

23. *Id.* at 86,605.

24. *Id.* at 86,604.

25. *Id.*

The *Statement of Informal Procedures* must be viewed in perspective. The SEC is attempting to preclude direct judicial review of shareholder proposal no-action determinations by stressing the informal aspects of the review process and by minimizing the legal impact of the no-action determination. As will be explained in greater detail, the SEC is correct in characterizing the no-action letters as informal administrative action lacking in legal effect.[26] But the SEC completely disregards the practical effects of a no-action determination.[27] The no-action letter is more than informal advice on the agency's enforcement position. More important, the no-action letter embodies a decision on the agency's part not to intervene in the proxy dispute on the shareholder's side. By deciding to remain neutral, the agency in fact reinforces the management's resolve to omit the proposal. The practical effects of the enforcement decision justify judicial review.

B. Direct Review of Shareholder Proposal No-Action Letters

1. Direct Review in the Court of Appeals

Before the District of Columbia Circuit's decision in *Medical Committee*,[28] it was generally assumed that SEC no-action letters, issued in connection with the omission of a shareholder proposal from management's proxy materials, were not reviewable in the courts.[29] No-action letters were thought to be unreviewable because they were characterized as informal advice rather than formal orders. The sole review provision of the Securities Exchange Act of 1934, section 25, limits direct review in the court of appeals to commission "orders" and rules promulgated under certain enumerated sections of the title.[30]

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26. See notes 94-107 & accompanying text *infra*.

27. See notes 243-72 & accompanying text *infra*.

28. 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

29. Aranow & Einhorn, *Corporate Proxy Contests: Enforcement of SEC Proxy Rules by the Commission and Private Parties*, 31 N.Y.U.L. REV. 875, 886 (1956); Clusserath, *The Amended Stockholder Proposal Rule: A Decade Later*, 40 NOTRE DAME LAW. 13, 17 (1964).

30. 15 U.S.C. § 78y (Supp. V, 1975).

In its 1975 amendment to section 25 of the Securities Exchange Act of 1934, Congress made changes regarding direct review in the court of appeals. Section 25(a), which deals with direct review of commission orders, was changed with the intention of merely codifying existing law rather than altering "the availability of Court review of orders or the manner in which such review is exercised." S. REP. No. 94-75, 94th Cong., 1st Sess. (1975). For this reason, section 25(a) is dealt with herein as it has been interpreted in the courts in the past, though the language is new.

Section 25(b), as amended, gives the right of direct review in the court of appeals of any rule promulgated under sections 6, 11, 11A, 15(c)(5)-(6), 15A, 17, 17A or 19 of the Securities Exchange Act, i.e., "any provision directly relating to the operation or

In 1969, the Medical Committee for Human Rights proposed an amendment to the corporate charter of Dow Chemical Company which would have prohibited the company from manufacturing napalm. Dow refused to include the proposal in its proxy materials. The SEC staff recommended that no enforcement action be taken by the commission to compel Dow to include the proposal, and the commission affirmed the staff's determination. The Medical Committee then appealed to the court of appeals under section 25(a) of the Securities Exchange Act. Section 25(a) provides: "A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals. . . ."[31]

The critical jurisdictional issue was whether the action by the commission in approving the staff recommendation that no action be taken against Dow Chemical was an "order" within the meaning of section 25(a).[32] In ruling that the no-action determination was indeed such an order, the court in *Medical Committee* made two findings: (1) that the no-action determination by the SEC operated with final effect on the Medical Committee;[33] and (2) that the informal procedure under which the recommendation was reached embodied the essence of a formal quasi-judicial proceeding.[34] The court emphasized that judicial review depended on an initial determination by the SEC to review the staff recommendation of no action.[35]

Four years later, in *Kixmiller v. SEC*,[36] the same court of appeals refused to find jurisdiction under section 25(a) where the SEC had refused to review its staff's no-action determination regarding a shareholder proposal. The court followed the *Medical Committee* distinction between commission and staff action and held that a staff no-action recommendation which the commission refused to review was not a commission "order" reviewable in the court of appeals.[37]

Kixmiller can be viewed in either of two ways. It can be interpreted as a narrow application of the *Medical Committee* principle that

regulation of the national market system, a national clearing system, or the SEC's oversight of the self-regulatory organizations." Since the rules regarding shareholder proposals were promulgated under section 14 of the act, section 25(b), as amended, has no effect on this article. Therefore, all discussion of direct review in the court of appeals will focus on the section 25(a) requirement that a commission "order" be involved.

31. 15 U.S.C. § 78y (Supp. V, 1975).
32. 432 F.2d 659, 665.
33. *Id.* at 667.
34. *Id.* at 670.
35. *Id.* at 675.
36. 492 F.2d 641 (D.C. Cir. 1974).
37. *Id.* at 644.

only commission no-action determinations are reviewable as orders in the court of appeals. On the other hand, there are indications in the *Kixmiller* opinion that, since *Medical Committee*, the District of Columbia Circuit has altered its view of the shareholder proposal review process and the legal impact of shareholder proposal no-action determinations.

In *Kixmiller*, the court stresses the informal nature of the review process and the fact that the no-action recommendation is advisory.[38] In *Medical Committee*, however, the court emphasizes the formality of the shareholder proposal review process at the staff level[39] and specifically contrasted the no-action determination with informal advice. The court stated that the SEC was formally deciding among adversary claims premised on legal arguments.[40] This conceptualization of the shareholder proposal review process as embodying the essence of a formal adversarial hearing was vital to the *Medical Committee* holding because the court maintained that the formal evidentiary proceeding required on the face of section 25(a) could be dispensed with if the informal procedure employed incorporated the fundamental adversarial features of a formal hearing.[41] The *Kixmiller* characterization of the staff review process as informal subverts the *Medical Committee* finding that the shareholder proposal review process is the functional equivalent of a formal proceeding.

The *Kixmiller* court also found to be minimal the adverse legal impact of the no-action determination which *Medical Committee* had used to support its finding that such a determination constituted an "order" under section 25(a). The *Medical Committee* court reasoned that a no-action determination had the effect of an "order" because the deference paid a commission no-action determination impaired the shareholder's private action against the company.[42] In contrast with its

38. "The Commission offers informal advice by its staff on a vast number of proxy solicitations." *Id.* at 645.

39. 432 F.2d 659, 668-72. *See* Note, *Medical Committee for Human Rights v. SEC: Judicial Review of SEC No-Action Determinations Under the Proxy Rules*, 57 VA. L. REV. 331, 339 (1971) [hereinafter cited as *Judicial Review of SEC*].

40. "The courts, we think, are abundantly capable of distinguishing between situations in which an agency gives informal advice and situations in which it formally decides among conflicting adversary claims premised on detailed legal arguments." 432 F.2d at 675.

41. The 1975 amendments have removed the explicit requirement of a proceeding from section 25(a). See note 30 *supra*. The amendments bring the statutory language in line with the numerous exceptions to that requirement which cases like *Medical Committee* have developed.

42. 432 F.2d at 666-68.

earlier decision, the court in *Kixmiller* saw the shareholder's private action in the district court as a viable option notwithstanding the staff's no-action determination.[43] Finally, *Medical Committee* found that the proposing shareholder was aggrieved because he had been coerced by the exhaustion doctrine into participating in the proceeding before the agency and, consequently, his recourse to an authoritative judicial determination on the merits had been delayed.[44] In *Kixmiller*, however the court stated that the shareholder can bypass the administrative process entirely.[45] Since the propriety of direct review of the no-action determination and the choice of reviewing courts hinges on the nature and effects of the no-action determinations, much of this article will be devoted to assessing the accuracy of the competing perceptions of shareholder proposal no-action determinations.

Kixmiller exposes weaknesses in the *Medical Committee*'s factual arguments. There are, however, also weaknesses in *Medical Committee*'s legal analysis which are much more important in terms of direct judicial review of informal agency action. The type of reasoning which the *Medical Committee* court employs to justify review of informal no-action determinations in the court of appeals as orders can be used to justify the review of informal actions in the court of appeals in other areas of administrative law which have review provisions similar to section 25(a) of the Securities Exchange Act. Since *Medical Committee* has been vacated as moot by the Supreme Court, the lower courts are free to re-evaluate whether informal action should be reviewable in the court of appeals. The second part of this article discusses the theoretical and practical shortcomings of the *Medical Committee* analysis. In the author's view, direct judicial review of shareholder proposal no-action determinations and informal administrative action generally should be restricted to the district courts under the APA.

2. *Direct Review in the District Courts Under the Administrative Procedure Act*

a. Action by the SEC Itself

In 1970 when *Medical Committee* was decided, the courts routinely held that informal agency action, including no-action letters and interpretive opinions, was not ripe for direct review under the

43. 492 F.2d at 645-46.
44. 432 F.2d at 667.
45. 492 F.2d at 645-46.

Administrative Procedure Act,[46] the provisions of which guarantee judicial scrutiny of any "final agency action."[47] In *Medical Committee*, the reviewability issue was framed as if the court had to choose between direct review in the court of appeals under section 25(a) or no judicial review at all.[48] In the last few years, however, the courts have abandoned the view that informal advisory opinions are unripe for judicial review. Shortly after *Medical Committee*, the District of Columbia Circuit, in *National Automatic Laundry & Cleaning Council v. Shultz*,[49] held that an informal interpretation of the Fair Labor Standards Act, issued by the Wage and Hour Administrator of the Department of Labor in response to inquiries from a trade association, was ripe for review under the APA. In *Independent Broker-Dealers Trade Association v. SEC*,[50] the same court held that informal SEC action of a different sort was reviewable under the APA. In that case, the plaintiffs were seeking review of a letter from the head of the SEC pressuring the New York Stock Exchange to abolish customer-directed "give-ups" of broker fees. In finding that review was warranted, the court emphasized that the practical effects of the letter established the jurisdiction of the district court. Subsequently, in *Potomac Federal Corporation v. SEC*,[51] a federal district court held that a staff action letter which the SEC approved was reviewable under the APA. A commission shareholder proposal no-action letter fits squarely under these decisions and therefore ought to be reviewable under the APA.

b. Action by the SEC Staff

National Automatic Laundry,[52] however, created a dichotomy

46. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 151 (1967); Sea-Land Service, Inc. v. Federal Maritime Comm'n, 402 F.2d 631 (D.C. Cir. 1968); Richfield Oil Corp. v. United States, 207 F.2d 864, (9th Cir. 1953); Hearst Radio, Inc. v. FCC, 167 F.2d 225 (D.C. Cir. 1948); West v. Bank of Commerce & Trusts, 153 F.2d 566 (4th Cir. 1946); Helco Prods. v. McNutt, 137 F.2d 681 (D.C. Cir. 1943); Midwest Coast Transport v. United States, 125 F. Supp. 557 (D.S.D. 1954); F.W. Maurer & Sons v. Andrews, 30 F. Supp. 637 (E.D. Pa. 1937); *cf.* Public Util. Comm'n v. United Air Lines, 346 U.S. 402 (1953). Florsheim v. Weinburger, 346 F. Supp. 950, 956-57 (D.D.C. 1972). *See generally*, 3 DAVIS, *supra* note 6, § 21.09.

47. 5 U.S.C. §§ 551(13), 702, 704 (1970).

48. The court stated, "Viewing the proxy rules in this light, we see no substantial reason why the absence of formal adjudicatory hearings in the regulatory scheme should render Commission decisions, however, capricious or erroneous, utterly immune to direct judicial review or redress." 432 F.2d at 671.

49. 443 F.2d 689 (D.C. Cir. 1971).

50. 442 F.2d 132 (D.C. Cir. 1971).

51. [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,704 (D.D.C. 1974).

52. 443 F.2d 689 (D.C. Cir. 1971).

between informal action by the head of an agency, which is presumptively ripe for direct review, and staff action, which is not. The court did not consider the possibility that informal staff action which the head of an agency refused to review might be ripe for judicial review. In *Potomac Federal Corporation*,[53] the court stated flatly, albeit in dictum, that a staff opinion letter which the commission refused to review would not be subject to judicial review. Finally, in *Koss v. SEC*,[54] a district court held unreviewable under the APA a request by the SEC staff that the plaintiff broker-dealer inform issuers of any Regulation A[55] offering naming him as the underwriter that he was under investigation and that if he were suspended, the Regulation A exemption might be lost. The court based its decision that the staff action was not ripe for review on the ground that the request did not represent the opinion of the SEC itself and that the SEC did not appear reluctant to oversee its staff activities. The sensitivity to the practical effect of the agency action on the plaintiff which the District of Columbia Circuit displayed in *Independent Broker-Dealers* was lacking in *Koss*. On the basis of these decisions, then, it would appear that staff shareholder proposal no-action letters which the SEC refuses to review are unreviewable in the courts under the APA.

It seems logical, however, that the quality of administrative decisionmaking is best at the highest level of an administrative agency and decreases as one travels down the ranks of the bureaucracy. Conversely, the need for supervision to ensure that informal administrative action comports with the law is greatest at the staff level. A rule which precludes judicial review when the head of an agency refuses to examine informal staff action immunizes arbitrariness and abuse at the staff level from public scrutiny. The third part of this article will present the argument that the standard ripeness methodology outlined in *Abbott Laboratories v. Gardner*[56] should be applied to informal administrative action at both the staff and head of the agency levels. Informal staff action which imposes hardships should be reviewable at the insistence of the affected persons unless the costs imposed on the agency outweigh the harm to the plaintiff. In particular, this article takes the position that staff shareholder proposal no-action determinations are ripe for review in the district courts under the Administrative Procedure Act.

53. [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,704 (D.D.C. 1974).
54. 364 F. Supp. 1321 (S.D.N.Y. 1973).
55. 17 C.F.R. §§ 230.251-263 (1976).
56. 387 U.S. 136 (1967).

II. Informal Administrative Action Should Be Reviewed in the District Courts Under the Administrative Procedure Act, Not in the Court of Appeals Under Statutory Review Provisions

The *Medical Committee* decision[57] held that informal administrative action by the head of an agency is reviewable in the court of appeals under a statutory review provision pertaining to review of formal administrative orders.[58] A similar statutory review provision is contained in many of the administrative statutes.[59] The court's intentions were good, but its analysis of the statutory review provision is tortured. For the theoretical and practical reasons outlined below, direct judicial review of informal administrative action should be restricted to the district courts under the Administrative Procedure Act.

A. Interpretation of Section 25(a) Prior to Medical Committee

To enable the SEC to discharge its regulatory functions, Congress delegated authority to the commission in certain specified situations to conduct formal adjudicative proceedings and to enter binding orders. For example, the SEC has the power to enter orders suspending or revoking the registration of broker-dealers,[60] to order that the rules of a national securities exchange be altered or supplemented,[61] and to order the withdrawal of the registration of a security.[62] The orders of the SEC conclusively determine the rights of the affected parties, subject to judicial review.[63]

Section 25(a) is coordinated with the provisions of the act which authorizes the SEC to enter binding orders. Section 25(a) requires that three conditions be satisfied before commission action is reviewable in the court of appeals.[64] The commission action must be (1) a final order issued by the SEC (2) entered pursuant to the proceed-

57. 432 F.2d 659 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

58. See notes 27-35 & accompanying text *supra*.

59. See note 6 *supra*.

60. Securities Exchange Act of 1934 § 15(b)(5), 15 U.S.C. § 780 (1970), *as amended*, 15 U.S.C. § 780 (Supp. V, 1975).

61. *Id.* § 19b, 15 U.S.C. § 78s (Supp. V, 1975).

62. *Id.* § 19a(2), 15 U.S.C. § 78s (Supp. V, 1975).

63. *Cf.* Hannah v. Larche, 363 U.S. 420, 442, 460-64 (1960); SEC v. Chenery Corp., 318 U.S. 80, 94 (1943); Amos Treat & Co. v. SEC, 306 F.2d 260, 263-64 (D.C. Cir. 1962); Associated Sec. Corp. v. SEC, 293 F.2d 738, 740 (10th Cir. 1961). *See also* United States v. Utah Constr. & Mining Corp., 384 U.S. 394, 421-22 (1966).

64. 15 U.S.C. § 78y(a)(1) (Supp. V, 1975).

ings required by the chapter;[65] and the appellant must be a person who is (3) aggrieved by the order. Since the act itself provides that the SEC must afford notice and a hearing before entering an order,[66] a formal order automatically qualifies for section 25(a) review.

Early cases applied section 25(a) literally, holding that only orders entered on the merits after a formal statutory proceeding were reviewable in the court of appeals.[67] This mechanical approach was relaxed in *American Sumatra Tobacco Corp. v. SEC*,[68] which focused on the effect of SEC action on the complainant. The court dispensed with absolute insistence on the procedural prerequisites of an evidentiary hearing, since the action taken was the equivalent of a statutory order. *American Sumatra* established the rule that when SEC action "operates particularly rather than generally—with a *judgment* entered on a state of facts and affecting only one person"—the action is reviewable in the court of appeals, notwithstanding the commission's failure to afford the complainant a formal adversary hearing.[69] For purposes of statutory review under section 25, the effect of the determination, not the nature of the proceedings, governs the availability of direct review in the court of appeals.[70]

65. After the 1975 amendments, this requirement no longer appears in the language of section 25(a), although Congress has stated that it intended no more than to bring the language of section 25(a) in line with the case law interpreting it. See note 30 *supra*.

66. 15 U.S.C. § 78w(c) (Supp. V, 1975).

67. *See* Wallach v. SEC, 206 F.2d 486 (D.C. Cir. 1953) (party requirement); Guaranty Underwriters v. SEC, 131 F.2d 370 (5th Cir. 1942) (final order requirement); Resources Corp. Int'l v. SEC, 97 F.2d 788 (7th Cir. 1938) (final order requirement); SEC v. Andrews, 88 F.2d 441 (2d Cir. 1937) (final order requirement); Third Ave. Ry. v. SEC, 85 F.2d 914 (2d Cir. 1936) (proceeding requirement); *cf.* Stardust, Inc. v. SEC, 225 F.2d 255 (9th Cir. 1955) (aggrieved party requirement); Crooker v. SEC, 161 F.2d 944 (1st Cir. 1947) (aggrieved party requirement).

68. 93 F.2d 236 (D.C. Cir. 1937).

69. *Id.* at 239 (emphasis added). A year later the same court restated its holding in *American Sumatra* as follows: "We held in the Sumatra Case that the order of the Commission might be subjected to review even though no hearing was held and no findings made to support the order, on the theory that under the circumstances of that case it was the duty of the Commission to hold a hearing and make findings." Mallory Coal Co. v. National Bituminous Coal Comm'n, 99 F.2d 339, 406 (D.C. Cir. 1938).

70. The District of Columbia Circuit also noted in *Mallory* that an agency could not transform an unreviewable action into a reviewable order merely by holding a formal hearing where the circumstances did not call for such a procedure: "In the same way, the action of such an agency in holding a hearing and making findings, under circumstances which do not call for such procedure, will not give a resulting order reviewable character, when otherwise it would not be subject to review." *Id.* Consequently, the emphasis which the *Medical Committee* opinion placed on the adversary aspects of the shareholder proposal review process is irrelevant, as a shareholder proposal no-action determination is not a statutory order within the ambit of section 25(a).

Judged by the pre-*Medical Committee* cases, a shareholder proposal no-action letter would seem an unlikely candidate for section 25(a) review. The Securities Exchange Act delegates power to the SEC to regulate the proxy solicitation process by commission rules and regulations.[71] The SEC, however, is not given authority to enter orders governing the content of proxy materials. This omission of the power to issue orders is in marked contrast to the SEC's authority under the Securities Act of 1933 to issue stop orders barring the distribution of misleading prospectuses[72] and its express power under the Public Utility Holding Company Act to regulate proxies by order.[73] When it determines that a shareholder's statement should be included in the management's proxy materials, the SEC must bring an enforcement action in the district court.[74] The legislative history of the Securities Exchange Act reveals that Congress weighed the impact of direct judicial review on the exercise of SEC functions when it determined which functions would be performed by rule, which by order, and which the SEC would have the option to perform by either rule or order.[75] Since the Congress did not empower the SEC to order companies to include shareholder proposals, commentators prior to *Medical Committee* thought that SEC shareholder proposal no-action determinations were unreviewable under section 25(a).[76]

71. Section 14(a) of the act provides: "It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security . . . registered pursuant to section 781 of this title." 15 U.S.C. § 78n(a) (1970).

72. Securities Act of 1933 § 8(d), 15 U.S.C. § 77h(d) (1970).

73. Public Utility Holding Company Act of 1935 § 11k(3), 15 U.S.C. § 79k (g)(3) (1970).

74. *See* Aranow & Einhorn, *Corporate Proxy Contests: Enforcement of SEC Proxy Rules by the Commission and Private Parties*, 31 N.Y.U.L. REV. 875, 876-883 (1956). *See generally* Loss, *The SEC Proxy Rules in the Courts*, 73 HARV. L. REV. 1041 (1960).

75. *See* PBW Stock Exchange, Inc. v. SEC, 485 F.2d 718, 723-26 (3d Cir. 1973).

76. *See* 3 Loss, *supra* note 11, at 1926; Aranow & Einhorn, *Corporate Proxy Contests: Enforcement of SEC Proxy Rules by the Commission and Private Parties*, 31 N.Y.U.L. REV. 875, 886 (1956); Note, *The SEC and "No-Action" Decisions Under Proxy Rule 14a-8: The Case for Direct Judicial Review*, 84 HARV. L. REV. 835, 858 (1971) [hereinafter cited as *No-Action Decisions*]. One commentator said, "It should be noted that SEC action under Rule 14a-8 is not, except in a few rare cases [under the Public Utility Holding Company Act], a formal administrative adjudicatory order within the meaning of the Administrative Procedure Act. Rather these decisions must be understood in their context as *informal* administrative determinations not directly subject to review by Courts of Appeals." Clusserath, *The Amended Stockholder Pro-*

B. The Shortcomings in the Medical Committee Analysis of the Breadth of Section 25(a)

Because shareholder proposal no-action determinations did not fall within the ambit of section 25(a) as it was then construed, the *Medical Committee* court resorted to general principles of judicial review and analogies to buttress its conclusion that the no-action letters were reviewable.[77] The opinion formulated new standards for determining whether section 25(a) was applicable without explaining why the established standards were inadequate. The court ignored the fact that earlier cases required the SEC to enter a formal quasi-judicial order under the authority conferred by the Securities Exchange Act before section 25(a) review was permitted.

Using a survey of numerous cases and commentaries on reviewability, the *Medical Committee* court found that two general factors determine whether a particular action is a reviewable order.[78] First, the action must operate "with final effect upon a particular individual, entity, or group."[79] Second, the proceedings at which the proposed action is considered must be characterized by some degree of formality.[80] Because the court found that the shareholder proposal review process embodied the fundamental characteristics of an adversary hearing, and because the no-action determination could be classified as an order, the court held that it had jurisdiction to review the SEC's determination under section 25(a).

1. *The Medical Committee Order Analysis*

The test which *Medical Committee* adopted for a reviewable order is inappropriate for section 25(a). The opinion states that an administrative action is a reviewable "order" if it operates with "final effect upon a particular individual, entity or group."[81] The cases and authorities which are cited for this proposition,[82] however, are concerned with review under more liberal statutory review provisions.[83] In contrast,

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posal Rule: A Decade Later, 40 NOTRE DAME LAW. 13, 17 (1964) (emphasis in original).

77. 432 F.2d 659, 666 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

78. *Id.*

79. *Id.*

80. *Id.* at 667.

81. *Id.* at 666.

82. The court cited Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967); Isbrandtsen Co. v. United States, 211 F.2d 51, 55, *cert. denied*, 347 U.S. 990 (1954); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 358, 403-04 (1965) [hereinafter cited as JAFFE].

83. One of the earliest of review statutes, and an example of one more liberal than

section 25(a) limits appellate jurisdiction to "orders"[84] entered pursuant to the Securities Exchange Act.[85] The interaction between section 25(a), the other provisions of the Securities Exchange Act which provide that the SEC will proceed by "order," and the prior case law construing section 25(a) discussed previously, establish that section 25(a) is limited to quasi-judicial orders, that is, to instances where the SEC pursuant to authority delegated in the act applies a statutory standard to a set of facts and enters an order which has the same effect as a lower court judgment.[86]

The court also attempted to support its conclusion that a no-action determination is a section 25(a) order by citing *Rochester Telephone Corp. v. United States*.[87] *Medical Committee* suggests that *Rochester*

section 25(a), is the Urgent Deficiencies Act (UDA), 38 Stat. 219 (1913), 28 U.S.C. §§ 1336, 1398 (1970). The relatively liberal statutory review provisions used by the courts in the cases cited by the *Medical Committee* court can be traced back to the UDA. The UDA provides that suits to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission must be brought in a three-judge district court. As construed in the courts, the UDA (and UDA-type statutes) embraces a broad range of administrative actions which are characterized by a degree of formality and which "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948). *See* Isbrandtsen Co. v. United States, 211 F.2d 51, 55, *cert. denied*, 347 U.S. 990 (1954). For a more detailed discussion of the UDA see 3 DAVIS, *supra* note 6, § 23.03; JAFFE, *supra* note 82, at 157-59.

84. 15 U.S.C. § 78y(a)(1) (Supp. V, 1975). Section 25(a) contemplates a formal trial-type hearing which culminates in an order. The section stipulates that the commission shall file with the court of appeals the record on which the order complained of is entered (*Id.* § 78y(a)(2)); that no objection shall be urged before the court that was not first urged before the commission (*Id.* § 78y(c)(1)); and that findings of fact of the commission are binding on the courts if they are supported by substantial evidence (*Id.* § 78y(a)(4)).

85. "But a statute which provides for review of an 'order' following a stated course of procedure will preclude the statutory review of the action qua 'order' where the stated administrative process has not been completed or is not a prelude to the action in question." JAFFE, *supra* note 82, at 418.

86. In one case, the court stated, "Congress has undertaken to provide within the Securities Exchange Act the machinery by which judicial orders of the Commission may be reviewed." American Sumatra Tobacco Corp. v. United States, 93 F.2d 236, 239 (D.C. Cir. 1937). *See also* United Gas Pipe Line Co. v. Federal Power Comm'n, 181 F.2d 796 (D.C. Cir.), *cert. denied*, 340 U.S. 827 (1950); *cf.* Federal Power Comm'n v. Metropolitan Edison Co., 304 U.S. 375, 384 (1938); Watson v. National Trans. Safety Bd., 513 F.2d 1081, 1082 (9th Cir. 1975); Atlanta Gas Light Co. v. Federal Power Comm'n, 476 F.2d 142, 147 (5th Cir. 1973); Division of Prod., Am. Petroleum Inst. v. Halaby, 307 F.2d 363, 365 (5th Cir. 1962); Magnolia Petroleum Co. v. Federal Power Comm'n, 236 F.2d 785 (5th Cir.), *cert. denied*, 352 U.S. 968 (1956); Philadelphia Co. v. SEC, 164 F.2d 889 (D.C. Cir. 1947), *cert. denied*, 333 U.S. 828 (1948); Standard Fruit & S.S. Co. v. Midwest Stock Exch., 178 F. Supp. 669, 675 (N.D. Ill. 1959).

87. 307 U.S. 125 (1939). In *Rochester*, the Federal Communications Commis-

is authority for finding that a shareholder proposal no-action decision is a section 25(a) order, for "that case, like the present controversy, involved a petitioner's attempt to obtain judicial review of 'action by the Commission which affects the complainant because it does not forbid or compel conduct with reference to him by a third person.' "[88] But the *Medical Committee* court took this language, which is dictum describing a certain kind of 'negative order' traditionally found unreviewable, quite out of context. *Rochester* can be cited fairly for the proposition that whether agency action is positive or negative in character is irrelevant for purposes of review, but *Rochester* does not support a finding that a no-action determination is a section 25(a) order.[89]

Although the *Medical Committee* court relied on cases decided under more liberal statutory review provisions than section 25(a),[90] the court still had to distort the nature and effects of the no-action determination even to satisfy these less restrictive requirements. The court cited three reasons why the shareholder was aggrieved by the SEC's no-action determination. First, the shareholder had to participate in the review process before the SEC or run the risk that the district court would dismiss his private action against the company on the ground that he failed to exhaust his administrative remedies.[91] There is, however, considerable doubt that a shareholder is required to exhaust SEC administrative remedies before he can bring a private action against a company.[92] The assertion that a shareholder is forced to participate in the administrative proceedings rests tenuously on one district court case.[93] There is no formal provision in the SEC rules for shareholder participation in the review process, and there is no real need for it. The

sion ordered all telephone carriers subject to the Communications Act to file schedules of their charges and other information with the agency. Rochester refused to comply with the order on the ground that it was exempt from the act. The FCC entered an order classifying Rochester as "subject to all common carrier provisions of the Communications Act of 1934, and, therefore, subject to all orders of the Telephone Division." *Id.* at 128. The Supreme Court held that the classification and implied refusal to find an exemption was a reviewable order. The Court observed that the FCC ruling "necessarily and immediately carried directions of obedience to previously formulated mandatory order . . . ." *Id.* at 143-44.

88. 432 F.2d at 668, *quoting* Rochester Tel. Corp. v. United States, 307 U.S. 125, 135 (1939).

89. *See* Note, *SEC Determinations Not to Enforce Its Shareholder Proposal Rule Held Subject to Judicial Review*, 71 COLUM. L. REV. 344, 351 (1971).

90. See note 83 & accompanying text *supra.*

91. 432 F.2d at 667.

92. *See* Loss, *The SEC Proxy Rules in the Courts*, 73 HARV. L. REV. 1041, 1064 (1960); *Judicial Review of SEC, supra* note 39, at 337.

93. *See* Peck v. Greyhound Corp., 97 F. Supp. 679 (S.D.N.Y. 1951).

commission makes its own decision whether or not it will bring an action to enforce its proxy rules when a company's management files its reasons for excluding a shareholder proposal. Finally, *Kixmiller* undercuts the exhaustion argument by declaring that the shareholder can bypass the administrative process completely.[94]

Second, the *Medical Committee* opinion relies heavily on the proposition that a shareholder's private right of action against a company for violation of the proxy rules is inadequate because the court in the private action will defer to the commission's no-action determination.[95] Since a shareholder's private action is supposedly impaired by the no-action letter, the court concludes that the no-action letter operates with final effect on the shareholder's rights and is therefore reviewable as an order.[96] This argument, however, is suspect. The SEC does not give detailed reasons for its no-action decisions,[97] and it expressly disclaims in the body of its no-action letters that it has adjudicated the merits of the dispute;[98] the court in the private action, therefore, has no basis for deferring to a no-action letter.[99] Language such

94. 492 F.2d 641, 646 (D.C. Cir. 1971).

95. The courts have in the past given such judicial deference to SEC no-action letters. *See, e.g.*, Brooks v. Standard Oil Co., 308 F. Supp. 810 (S.D.N.Y. 1969); Union Pac. R.R. v. Chicago & N.W. Ry., 226 F. Supp. 400 (N.D. Ill. 1964); Curtin v. American Tel. & Tel. Co., 124 F. Supp. 197 (S.D.N.Y. 1954).

96. 432 F.2d at 667-68.

97. *See* Lockhart, *SEC No-Action Letters: Informal Advice as a Discretionary Administrative Clearance*, 37 L. & CONTEMP. PROB. 95, 120 (1972) [hereinafter cited as Lockhart]; *No-Action Decisions, supra* note 76, at 843.

98. "While Rule 14a-8(d) does not provide for any communications from shareholders to the Commission's staff, the staff, of course, will always consider information concerning alleged violations of the statutes administered by the Commission and this may include argument as to why it is believed that activities proposed to be taken would be violative of the statute or rule involved. The receipt of such information or argument, however, is not to be construed as changing the staff's informal investigatory procedures and proxy review into a formal or adversary procedure. The enforcement judgment that the staff has reached does not and cannot purport to 'adjudicate' the merits of the company's posture in this matter. Only a district court can decide whether the company is obligated to include the instant proposal in its proxy materials." *See* Letter from Peter J. Romeo, Attorney on the SEC staff, to Melvin L. Bedrick, Counsel for the Washington Post Co., Mar. 1975, in Appendix to Petition for Review, Kixmiller v. SEC, 492 F.2d 641 (D.C. Cir. 1974).

99. *See* Statement of Informal Procedures, *supra* note 19, at 86,604-05. Of 895 proposals which were successfully excluded from proxy statements from fiscal 1956 through 1969, only 3 were privately contested in the district courts. In each of these 3 cases the shareholder lost because the court improperly placed weight on the commission's no-action determination. Note, *SEC Determinations Not to Enforce Its Shareholder Proposal Rule Held Subject to Judicial Review*, 71 COLUM. L. REV. 344, 348.

The proper method, however, for rectifying the district court's mistaken deference to commission no-action determinations and for effectuating the shareholder's private action is to pursue the district court's decision in the private action to the court of appeals

as "judicial deference" would be appropriate if a shareholder's remedy were exclusively in the SEC. But it is clear that the only remedy, whether sought by the shareholder independently or by the SEC on the shareholder's behalf, is in the courts. No SEC decision affecting the rights of the parties is involved in a no-action determination. The SEC has merely decided not to pursue the protection of the shareholder's rights in the courts. Section 26 of the Securities Exchange Act[100] and rule 14a-9,[101] for instance, state that SEC examination of proxy material filed with it is not to be deemed a finding by the commission that the material is accurate or complete. Consequently, no legal inference can properly be drawn from the fact that the SEC has decided to accept a company's statement justifying its decision to exclude a shareholder's proposal.[102]

Finally, as a third reason why the shareholder was aggrieved by the no-action determination, the *Medical Committee* opinion emphasized that the no-action determination deprived the shareholder of SEC assistance.[103] Although this analysis is true in effect, deprivation of SEC assistance does not transform the enforcement decision into a reviewable order. Actions are not even reviewable as orders under statutory review provisions more liberal than section 25(a) unless "rights or obligations have been determined or legal consequences will flow from the agency action."[104] As previously explained,[105] no legal

to reverse the error in deferring to no-action determinations, rather than pursuing direct review. Direct review is a circuitous method for protecting shareholder's rights. Moreover, there is also the danger that the court in the action for direct review will make the same mistake of deferring to the no-action determination.

100. 15 U.S.C. § 78z (1970).

101. *See, e.g.*, 17 C.F.R. § 240.14a-9(b) (1976).

102. A student comment which examined the cases in which the courts allegedly deferred to SEC no-action letters concluded that the courts paid lipservice to the concept of deference and then reexamined the legal issues on the merits. *Judicial Review of SEC, supra* note 39. Even if one assumes for purposes of argument that district courts will defer to an SEC shareholder proposal no-action determination in a private action, the appropriate procedure for correcting the district court's error in deferring to the no-action determination is to appeal the private action to the appellate courts. The possibility that district courts may pay undue deference to an SEC no-action decision is not a valid reason for concluding that the no-action determination is reviewable under section 25(a).

Alternatively, if the District of Columbia Circuit believed in *Medical Committee* that a no-action determination should be deferred to in a private action, there would be little advantage in allowing the shareholder to invoke section 25(a), since the no-action determination would be entitled to equal deference in the court of appeals.

103. 432 F.2d at 667.

104. Port of Boston M.T. Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970).

105. See text accompanying note 102 *supra*.

consequences stem from the no-action determination, and the shareholder's rights are not affected by the no-action determination because he has no legal right to compel the SEC to bring an enforcement action.[106] Consequently, the enforcement decision is not a reviewable order,[107] even under more liberal statutory review provisions.

2. The Proceeding Requirement

The *Medical Committee* court recognized that section 25(a) applies only to formal orders and thus was faced with the task of explaining why section 25(a) should apply to a no-action determination which was not the product of a formal statutory proceeding. Initially, the court cited *Cities Service Gas Co. v. Federal Power Commission*,[108] *Phillips Petroleum v. Federal Power Commission*,[109] and *Isbrandtsen Co. v. United States*[110] for the proposition that the absence of a formal evidentiary hearing does not compel the conclusion that an administrative decision is unreviewable under statutory review provisions analogous to section 25(a).[111] This result is necessary, the court argues, because agencies are frequently confronted with situations in which substantial questions of fact, law, or policy may be properly resolved through procedures less cumbersome than "trial-type" hearings.[112] Although it is undoubtedly correct that the evidentiary hearing requirement is dispensable under some circumstances, the *Medical Committee* opinion neglects to state the mitigating circumstances which will permit judicial review in the absence of the requisite proceeding. Each of the three cases cited in *Medical Committee* involved an interim order entered in advance of a formal hearing in which the final order was to be issued.[113] There was no doubt that the final order which would

106. *See* Project on Corporate Responsibility v. SEC, [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,783 (D.C. Cir. 1972); Dyer v. SEC, 291 F.2d 774, 781 (8th Cir. 1961); Leighton v. SEC, 221 F.2d 91 (D.C. Cir.), *cert. denied*, 350 U.S. 825 (1955). *See generally* Stardust, Inc. v. SEC, 225 F.2d 255 (9th Cir. 1955); Crooker v. SEC, 161 F.2d 944 (1st Cir. 1947); SEC v. Andrews, 88 F.2d 441 (2d Cir. 1937).

107. *See Judicial Review of SEC, supra* note 39, at 338.

108. 255 F.2d 860 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958).

109. 227 F.2d 470 (10th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956).

110. 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954).

111. 432 F.2d at 668.

112. *Id.*

113. In *Cities Service*, the order which the petitioner sought to have reviewed in the court of appeals was a Federal Power Commission order under 15 U.S.C. § 717c(c) (1970), accepting for filing a rate schedule submitted by a natural gas company. The order had the same practical effect as FPC approval of the filed rates after a statutory proceeding, since the commission denied the complainants' petition for a rehearing. The commission had not entered an order after a hearing concerning the lawfulness of the

be entered in the proceeding was reviewable under the statutory review provision.[114] The principal question was whether the interim orders were ripe for review in light of the principle that interlocutory orders are unreviewable until the review of the final order.[115] The courts held that interim orders were final for the purposes of review if they imposed an obligation, denied a right, or fixed a legal relationship as the consummation of the administrative process.[116] It should be noted that this test performs two functions: it simultaneously defines what actions are orders, and determines when agency action is ripe for review.[117] In *Cities Service Gas Co., Phillips Petroleum* and *Isbrandtsen*, this test governed the determination that the interlocutory orders were ripe for purposes of review, but in determining whether the interlocutory actions were orders for purposes of statutory review in the court of appeals, the courts looked to the requirements of the statutory review provision. The interim orders were determined to be reviewable in the court of appeals as "orders" because they were short-term equivalents of the final orders which Congress had granted the agency authority to enter, and which were clearly reviewable under the statutory review provisions.[118] The rule that emerges from these three

rates (as it is authorized to do under 15 U.S.C. § 717c(e) (1970)) which would automatically qualify as a final commission order reviewable in the court of appeals. Cities Service Gas Co. v. Federal Power Comm'n, 255 F.2d 860 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958). In *Phillips Petroleum*, the petitioners sought judicial review of an order suspending rate filings until a hearing on the reasonableness of the orders could be held and a final order entered. Phillips Petroleum Co. v. Federal Power Comm'n, 227 F.2d 470 (10th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956). *Isbrandtsen* involved a United States Maritime Commission order which allowed a rate schedule to go into effect pending hearings which were to be held on the rate schedule. Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954).

114. Natural Gas Act of 1938, § 19(b), 15 U.S.C. § 717r(b) (1970). A final order of the Maritime Commission is reviewable in the court of appeals under 28 U.S.C. § 2342(3) (1970).

115. *See* Federal Power Comm'n v. Metropolitan Edison Co., 304 U.S. 375, 384 (1938).

116. *See* Cities Service Gas Co. v. Federal Power Comm'n, 255 F.2d 860, 863 (10th Cir.) *cert. denied*, 358 U.S. 837 (1958); Phillips Petroleum Co. v. Federal Power Comm'n, 227 F.2d 470, 474 (10th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956); Isbrandtsen Co. v. United States, 211 F.2d 51, 55 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954).

117. *See* JAFFE, *supra* note 82, at 419.

118. In *Phillips Petroleum* the court stated: "In any event, the legal consequences which attach to these orders have conclusive effect upon the rights and duties of Phillips as an independent producer under the Natural Gas Act and they are therefore reviewable." 227 F.2d at 475. Similarly, in *Isbrandtsen* the court noted: "The Board's action was just as determinative of Isbrandtsen's rights as it would have been had the Board specifically and affirmatively approved the dual rate system agreement in accordance with the statutory requirements . . . ." 211 F.2d at 56.

cases is that the court of appeals has jurisdiction, even though an agency has not held an evidentiary hearing or entered a final order on the merits, where: (1) an interim order is entered in advance of the evidentiary hearing which will result in the entry of a final order, and the interim order is the short-term equivalent of a final order;[119] (2) the agency has decided that it is more efficient to enter an order without a formal evidentiary hearing;[120] or (3) the agency is attempting to preclude statutory review by refusing to conform to the hearing requirements enunciated in the statutory review provision.[121] The three cases stand for the proposition that it is the nature of the order rather than the process by which the order is entered which determines whether the court of appeals has jurisdiction under section 25(a) or a related statutory review provision. The observation in *Medical Committee* that an evidentiary hearing is not an absolute prerequisite for section 25(a) review is accurate then, but reliance on the *Cities Service, Phillips Petroleum*, and *Isbrandtsen* cases is misplaced. No-action determinations cannot be construed as binding quasi-judicial orders within the contemplation of section 25(a), and therefore do not come within the rule of these cases.[122]

After noting that the failure to hold an evidentiary hearing does not necessarily bar section 25(a) review, the *Medical Committee* court attempts to demonstrate that a formal hearing would be superfluous. It states that the SEC utilizes an informal procedure which preserves the essential features of a formal proceeding to consider proxy filings.[123] The opinion emphasizes that the elaborate rules which set forth a proposing shareholder's procedural and substantive rights incorporate the essence of an adversary encounter.[124] For instance, management is required to file a statement of its reasons for excluding a shareholder's proposal thirty days before the date the preliminary copies of the proxy materials are filed.[125] If the company relies on legal grounds

119. *See* Cities Service Gas Co. v. Federal Power Comm'n, 255 F.2d 860 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958); Phillips Petroleum Co. v. Federal Power Comm'n, 227 F.2d 470 (10th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956); Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954).

120. *See* Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 688 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

121. *See* Cities Service Gas Co. v. Federal Power Comm'n, 255 F.2d 860, 863 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958).

122. See notes 81-107 & accompanying text *supra*.

123. 432 F.2d at 669-70.

124. *Id.* at 670.

125. 17 C.F.R. § 240.14a-8(d) (1976).

for excluding the proposal, it must file supporting opinions of counsel.[126] Copies of the management's filings must be sent to the proposing shareholder.[127] The shareholder has an opportunity to respond with detailed legal arguments.[128] Finally, the rules place the burden of proof on the management to show that the proposal is not a proper subject for shareholder action.[129]

The proxy rules governing shareholder proposal no-action letters are more structured than the procedure associated with ordinary no-action letters. The differences in procedure, however, do not result in a meaningful difference in substance between shareholder proposal no-action letters and other no-action letters, which the *Medical Committee* opinion concedes are unreviewable under section 25(a). The adversary aspects of the shareholder proposal review process, which *Medical Committee* attributes to the intervention of the proposing shareholder, are overplayed.[130] The fact that the burden of proof is placed on management is no different from the ordinary no-action situation where a party requests SEC affirmation that the party is entitled to an exemption from the securities laws. The burden of proof is always on the person claiming an exemption.[131] And, theoretically, even if the proposing shareholder elected not to intervene in the proceeding to determine whether his proposal had to be included in management's proxy material, the process would proceed unaffected, since the agency is charged with protecting the rights of investors under the proxy rules.[132]

Apart from the arguments that the shareholder proposal review process embodies the essence of a formal trial-type hearing, the District of Columbia Circuit attempts to show that the SEC itself categorizes the shareholder proposal review process as a formal proceeding. Disregarding the informal nature of the actions taken by the SEC staff in arriving at a no-action recommendation, the District of Columbia Circuit points to the commission's regulations, which distinguish between formal proceedings and informal proceedings.[133] Section 201.1(c) of

126. *Id.*
127. *Id.*
128. *Id.*
129. *See* 432 F.2d at 670; 19 Fed. Reg. 246 (1954).
130. See note 98 *supra.*
131. *See* SEC v. Ralston Purina Co., 346 U.S. 119, 126 (1953); SEC v. Continental Tobacco Co., 463 F.2d 137, 156 (5th Cir. 1972).
132. The Securities Exchange Act of 1934 § 14(a), 15 U.S.C. § 78n(a) (1970).
133. Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 669-70 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

the SEC regulations[134] states that the statutes and the rules published under those statutes prescribe the course and method of formal procedures to be followed in SEC proceedings. The court, in effect, argues that since the SEC has promulgated detailed rules to govern proceedings under section 14 of the Securities Exchange Act, the shareholder proposal review process must be a "formal proceeding."[135] The court then notes that section 201.1(d) of the SEC regulations states that informal proceedings of the commission are largely concerned with the giving of advice by the members of the commission staff.[136] Finally, the court looks to a section of the SEC brief which states that the SEC has not found it necessary to prescribe rules in the normal no-action situation (as opposed to shareholder proposal no-action) because in the former there is only one interested party.[137] From this the court concludes that the difference between formal and informal SEC proceedings depends upon whether the process by which the action is taken is governed by detailed rules.[138] Since the court previously had found that the no-action determination qualified as an "order,"[139] and since the review process by the above reasoning was found to be a formal proceeding, the no-action determination allegedly satisfied all the conditions of section 25(a).

In making the above argument, however, the court ignored the fact that part 202 of the commission's regulations,[140] which deals with informal and other procedures, includes a description of the processing of proxy materials filed with the SEC. Section 202.5(d) specifically discusses the issuance of no-action letters as a part of the informal proceedings section of the SEC regulations. Thus, the SEC is correct in maintaining that the shareholder proposal review process is an informal proceeding.

C. Cases Subsequent to Medical Committee Which Shed Light on the Breadth of Section 25(a)

The critique of *Medical Committee* would be complete at this

134. 17 C.F.R. § 202.1(c) (1976).

135. 432 F.2d at 669 n.11.

136. *Id.* at 669 & n.11.

137. *Id.* at 669.

138. The court's reasoning in *Medical Committee* is implicit rather than explicit. The argument in the text has been reconstructed from the court's inferences which come in part from the portions quoted from the SEC's Supplementary Memorandum and the italicized portion of 17 C.F.R. § 202.1 (1976) quoted in note 11 of the opinion.

139. 432 F.2d at 665-68.

140. 17 C.F.R. § 202 (1976).

point if it were not for developments in the application of statutory review provisions subsequent to *Medical Committee* which are eroding the distinction between quasi-judicial orders and administrative rule making. Until recently, the courts in construing statutory review provisions similar to section 25(a) refused to review agency rules on the ground that they were not quasi-judicial orders,[141] leaving such review to the district courts under the Administrative Procedure Act.[142] However, in *City of Chicago v. Federal Power Commission*,[143] the District of Columbia Circuit held that Federal Power Commission rules setting area rates were reviewable in the court of appeals under a statutory review provision if the court had the full and complete evidentiary record of the hearings before the commission. *Deutsche Lufthansa Aktiengesellschaft v. CAB*[144] went beyond *City of Chicago*. There, a foreign air carrier challenged a regulation promulgated by the CAB requiring all domestic and foreign air carriers to include on their passenger tickets a notice of the liability limitation for baggage loss or damage. The District of Columbia Circuit declared that where evidence is assembled by an agency and where the contested issues are legal in nature, administrative regulations are ripe for review in the appellate courts; the touchstone for appellate review is the availability of a record for review, not the classification of the administrative action as quasi-judicial or quasi-legislative.

The *Deutsche Lufthansa* holding seems to bolster the argument for reviewing shareholder proposal no-action decisions under section 25(a). The case erases the distinction between judicial and nonjudicial orders and states that an evidentiary hearing is not required where the issues are legal in nature. The case does not, however, purport to extend statutory review to essentially informal agency actions which are not taken pursuant to statutory authority to promulgate rules or to enter orders having the force of law. Instead, *Deutsche Lufthansa* embodies the principle that where a formal agency function including

141. *See* United Gas Pipe Line Co. v. Federal Power Comm'n, 181 F.2d 796 (D.C. Cir.), *cert. denied*, 340 U.S. 827 (1950); *cf.* Division of Prod., Am. Petroleum Inst. v. Halaby, 307 F.2d 363 (5th Cir. 1962); Sun Oil Co. v. Federal Power Comm'n, 304 F.2d 293, (5th Cir.), *cert. denied*, 371 U.S. 861 (1962); Wisconsin v. Federal Power Comm'n, 292 F.2d 753 (D.C. Cir. 1961); Magnolia Petroleum Co. v. Federal Power Comm'n, 236 F.2d 785 (5th Cir. 1956), *cert. denied*, 352 U.S. 968 (1957); Arrow Airways, Inc. v. CAB, 182 F.2d 705 (D.C. Cir.), *cert. denied*, 340 U.S. 828 (1950).

142. 5 U.S.C. §§ 551(13), 704 (1970). *See, e.g.*, Alaska Airlines, Inc. v. CAB, 257 F.2d 229 (D.C. Cir.), *cert. denied*, 358 U.S. 881 (1958).

143. 458 F.2d 731 (D.C. Cir. 1971).

144. 479 F.2d 912 (D.C. Cir. 1973).

both rule making and adjudication is handled in an informal manner (such as notice and comment rule making under section 4 of the APA), an appellate court, under a statute similar to section 25(a), has jurisdiction to review the action taken even though the agency failed to hold formal hearings. The holding of the case would permit direct review of commission rules enacted to govern shareholder proposals; such rules arguably would affect the legal rights of complainants with a finality contemplated by section 25(a). But *Deutsche Lufthansa* would not allow for review of SEC no-action decisions under section 25(a). The Securities Exchange Act withholds the power to enter orders governing the content management's proxy materials, and no-action determinations do not adversely affect shareholders, who can still proceed independently to enforce their rights in court.

Moreover, there is precedent which would bar extension of the *Deutsche Lufthansa* holding to section 25(a). In a decision which appeared contemporaneously with *Deutsche Lufthansa*, the Third Circuit held that quasi-legislative actions of the SEC are not reviewable under section 25(a). The petitioners in *PBW Stock Exchange, Inc. v. SEC*[145] had challenged a commission rule promulgated under section 19(b) of the Securities Exchange Act which restricted membership on a national exchange to brokerage firms conducting at least 80 percent of their business with "non-affiliated persons." The opinion states that the legislative history of the Securities Exchange Act reveals that Congress purposefully granted the SEC the option of regulating exchanges either by rules or by order.[146] If the commission chooses to proceed by order, the action is reviewable under section 25(a) in the court of appeals. If, on the other hand, the commission elects to promulgate a rule, the rule is not reviewable under section 25(a). The court rejected the petitioner's argument that cases arising under the Urgent Deficiencies Act,[147] most notably *Columbia Broadcasting System v. United States*,[148] required that commission rules, as well as orders, be reviewable under section 25(a).[149] The Third Circuit observed that neither the legislative history of the Urgent Deficiencies Act nor the precedents arising under the act could be attributed to section 25(a).[150] The court, however, was careful to note that its dis-

145. 485 F.2d 718 (3d Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).
146. *Id.* at 722-26.
147. See note 83 *supra*.
148. 316 U.S. 407 (1942).
149. 485 F.2d at 726-31.
150. *Id.* at 731 n.14.

missal for lack of jurisdiction under section 25(a) did not rule out the possibility that a district court would have jurisdiction under the APA or its general jurisdiction to review rules promulgated by the SEC.[151] The opinion's narrow interpretation of section 25(a) reaffirms the principle that the statutory review provision is restricted to quasi-judicial orders of the SEC.

The distinction between orders which are reviewable in the court of appeals under section 25(a) and other agency actions which are reviewable in the district court is consistent with the District of Columbia Circuit's decision in *Independent Broker-Dealers Trade Association v. SEC*.[152] There, the court held that a letter from the commission to a stock exchange, requesting a change in the exchange's rate structure, was reviewable under the APA as "final agency action." At the time this case was decided, section 19(b) of the Securities Exchange Act specified a two-step procedure for the regulation of national securities exchanges.[153] The challenged letter—a formal request by the commission that the exchange voluntarily change its practices—was the first step in the statutory scheme.[154] If the exchange refused to comply, the SEC took the second step under 19(b), which was to promulgate a rule or to enter an order directing the exchange to alter or supplement its rules.[155] The court held that the commission's letter constituted "agency action" under the APA.[156] Consequently, it vacated the district court's dismissal for want of jurisdiction. The District of Columbia Circuit noted that the concept of agency action reviewable under the APA is distinct from the concept of order in section 25(a):

> Section 25(a) applies in terms only to "orders," a narrower concept than that of "agency action" reviewable in district courts, and is available only to persons who were "parties" to actual agency proceedings. It was intended to provide direct review in cases wherein a clear, formal record of an administrative hearing would be before the reviewing court without the need for presentation to a court of evidence (or affidavit) of the agency's action.[157]

A commission shareholder proposal no-action letter is less formal than a commission request letter once required under section 19(b)

151. *Id.* at 721-22 n.3, 733.
152. 442 F.2d 132 (D.C. Cir. 1971).
153. 15 U.S.C. § 78s(b) (1970). Section 19(b) was amended by 15 U.S.C. § 78s (c) (Supp. V, 1975). The Commission may now alter the rules upon notification and after the opportunity for a hearing.
154. 15 U.S.C. § 78s(b) (1970).
155. *Id.*
156. 442 F.2d at 137.
157. *Id.* at 143.

because there is no provision in the Securities Exchange Act for no-action letters.[158] If the court's reasoning in *Independent Broker-Dealers* was correct, and the requests then required under section 19 were properly reviewable in the district courts under the APA rather than in the court of appeals under section 25(a), shareholder proposal no-action letters should be reviewed there also.

D. The Choice Between Direct Review in the Court of Appeals and in the District Courts

The District of Columbia Circuit conceded in *Medical Committee* that the question whether a no-action determination qualifies as a section 25(a) order is a close question.[159] The court invoked two general principles of judicial review to swing the balance in favor of direct review in the court of appeals. First, the court cited the *Abbott Laboratories*[160] doctrine that there is a strong presumption that administrative action is judicially reviewable.[161] Second, and more important, the court concluded that pragmatic considerations favor direct review of SEC action rather than the shareholder's private action against the company.[162] The *Medical Committee* opinion stresses the fact that Congress intended the Securities Exchange Act to be implemented by the SEC, not by private actions brought by individual security holders.[163] Also, direct review permits judicial supervision of the SEC to ensure that the investing public obtains vigorous, efficient and even handed implementation of the theory of corporate democracy incorporated in the proxy rules.[164]

The *Medical Committee* opinion, however, does not compare the relative advantages of direct review in the court of appeals with direct review in the district courts. The general principles of judicial review which the court used to find a no-action determination reviewable are neutral regarding which court should do the reviewing. First, the *Abbott Laboratories* principle that there is a presumption in favor of direct review of administrative action does not support a preference for review in the court of appeals under section 25(a). *Abbott Labora-*

158. *See* Lockhart, *supra* note 98, at 95.

159. 432 F.2d 659, 688 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

160. Abbott Labs. v. Gardner, 387 U.S. 136 (1967); see notes 178-86 & accompanying text *infra* for a discussion of this case.

161. 432 F.2d at 666.

162. *Id.* at 667, 672.

163. *Id.* at 672.

164. *Id.*

tories[165] is a case under the APA; arguably, its precise holding is that there is a presumption of direct review in the district courts. Second, the argument that Congress intended the Securities Exchange Act to be enforced by the SEC and the argument that judicial supervision of the proxy process is advantageous have equal force when applied to district court review under the Administrative Procedure Act. Since review of informal action under the APA is an alternative to statutory review, there is no need to distort the "order" and "proceeding" requirements of the specialized statutory review provisions to provide a forum for the review of informal agency action in the court of appeals.

Practical considerations, however, favor direct review of informal agency action in the district courts rather than in the court of appeals. First, there is no reason to add to the workload of the court of appeals when the district courts are equally capable of reviewing informal administrative action. Since there are many more district courts than courts of appeals, there will be less delay if direct review of informal agency action is handled initially in the district courts. The time it takes to have informal action reviewed is a major consideration because delay either increases the detriment suffered by the complaining party or impedes the administrative process, depending on whether the plaintiff's or the agency's position is sustained. Second, the district courts are better equipped than the courts of appeals to review informal agency action. The district court, unlike the court of appeals, has wide ranging discovery powers,[166] and effective judicial review of agency actions

165. 387 U.S. 136 (1967).

166. Rule 1 of the Federal Rules of Civil Procedure states that the rules govern procedures in the United States District Courts. The Federal Rules of Civil Procedure, including the discovery provisions of Rules 26-37, do not apply to the courts of appeals. *See* Hines v. Royal Indemnity Co., 253 F.2d 111, 113 (6th Cir. 1958).

Section 25(a) of the Securities Exchange Act of 1934 and equivalent statutory review provisions envision that questions of fact will be restricted to issues raised in the record made before the agency. The statute provides that any party may apply to the court of appeals for leave to adduce additional evidence, but such additional evidence is to be taken in a hearing before the agency. Neither the statutory review provision nor the Federal Rules of Appellate Procedure, and in particular Rules 15-20 which deal with review of administrative orders, provide for independent discovery outside of the administrative hearing.

It has been held in isolated cases that the appellate courts possess authority under the "all writs" statute, 28 U.S.C. § 1651 (1970), to utilize discovery procedures similar to those contained in the Federal Rules of Civil Procedure. Olson Rug Co. v. NLRB, 291 F.2d 655, 659 (7th Cir. 1961); Bethlehem Shipbuilding Corp. v. NLRB, 120 F.2d 126 (1st Cir. 1941). The fact that a court of appeals can order discovery on an ad hoc basis with respect to administrative practices and procedures does not offset the advantage which the district court has in having express and detailed discovery rules which

requires factfinding capabilities. There will be occasions when plaintiffs will challenge not only the legality of informal agency action but also the way in which the decision was reached. For example, the decision may be attacked as arbitrary and capricious on factual grounds, or the plaintiffs may attack the informal action on the ground that it is inconsistent with past agency practice. Also, the question of ripeness for review may involve contested factual issues. Third, the district courts have injunctive powers which are not shared by the court of appeals.[167] The district courts are therefore able to afford more complete relief to the party aggrieved by the administrative action. Finally, once a court decides to review informal administrative action, it must then decide substantive legal questions concerning the power of the agency and the proper interpretation of administrative acts. The quality of the substantive decisions may be enhanced if the district court resolves the issues initially, with the court of appeals playing its traditional appellate role.

To recapitulate, section 25(a)-type statutory review provisions are reserved for formal quasi-judicial administrative orders which have the same legal effect as the decisions of a lower court. Such orders are reviewable in the court of appeals even if the administrative agency adopts them informally. *Medical Committee* muddies the waters of judicial review of informal administrative action by creating the possibility that a broad range of informal administrative actions will be reviewed in the court of appeals under the specialized section 25(a)-type statutory review provisions. An examination of the *Medical Committee* jurisdictional analysis has revealed that the court's reasoning is distorted. For theoretical and practical reasons, direct review of informal administrative action should be restricted to the district courts under the Administrative Procedure Act.[168]

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govern pretrial procedure and the experience which the district court judges have in administering the discovery rules.

167. In *Medical Committee* the District of Columbia Circuit conceded that there would be situations where the district courts would be able to grant more effective relief: "The petitioner does not seek any relief which is peculiarly within the competence of the district court; instead, it seeks merely to have the cause remanded so that the Commission, in accord with proper standards, can make an enlightened determination of whether enforcement action would be appropriate." 432 F.2d 659, 672 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

Rule 65 of the Federal Rules of Civil Procedure empowers the district courts to grant injunctive relief. The Federal Rules of Appellate Procedure do not contain similar provisions, although injunctive relief might be available on an ad hoc basis under the "all writs" statute. 28 U.S.C. § 1651 (1970).

168. Judicial review of SEC actions under the Securities Exchange Act of 1934 is

III. Direct Review of Informal Staff Action

In *Medical Committee*, the District of Columbia Circuit stated that the reviewability of shareholder proposal no-action letters hinges on the initial decision of the commission to review the staff's no-action deci-

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structured as follows: Formal commission orders which are entered or should have been entered after a statutory proceeding are reviewable in the court of appeals under section 25(a). The court of appeals retains jurisdiction over such orders even if the agency enters the order informally (that is, without holding a trial-type hearing) for reasons of efficiency, to evade statutory review, or because the facts are undisputed and the agency is faced with a legal question which can be decided on the basis of briefs without a formal hearing being held. *See* Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 668 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972); Cities Service Gas Co. v. Federal Power Comm'n, 255 F.2d 860, 863 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958). Interim orders entered in advance of formal hearings which resemble in legal effect the final order which ultimately will be entered in a formal proceeding are reviewable under section 25(a); *cf.* Cities Service Gas Co. v. Federal Power Comm'n, 255 F.2d 860 (10th Cir.), *cert. denied*, 358 U.S. 837 (1958); Phillips Petroleum v. Federal Power Comm'n, 227 F.2d 470 (10th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956); Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954). Commission actions which operate "particularly rather than generally—with a *judgment* entered on a state of facts and affecting only one person" are reviewable as orders in the court of appeals even though the action in question is not designated as an order and is issued without a trial-type hearing. *See* American Sumatra Tobacco Corp. v. SEC, 93 F.2d 236, 239 (D.C. Cir. 1937) (emphasis added); *cf.* Philadelphia Co. v. SEC, 164 F.2d 889 (D.C. Cir. 1947) *cert. denied*, 333 U.S. 828 (1948). Interlocutory orders entered in a formal proceeding are ordinarily unreviewable until the entry of the final order. *See* Federal Power Comm'n v. Metropolitan Edison Co., 304 U.S. 375 (1938); R.A. Holman & Co. v. SEC, 299 F.2d 127 (D.C. Cir.) *cert. denied*, 370 U.S. 911 (1962); Eastern Utilities Assoc. v. SEC, 162 F.2d 385 (1st Cir. 1947); Jones v. SEC, 79 F.2d 617 (2d Cir.), *cert. denied*, 297 U.S. 705 (1935). If the plaintiff alleges irreparable injury, action in excess of statutory powers, or lack of jurisdiction, he can obtain judicial review of interlocutory orders entered in a formal proceeding in the district courts under the APA or the courts general equity jurisdiction. 28 U.S.C. § 1337 (1970); *see* Utah Fuel Co. v. National Bituminous Coal Comm'n, 306 U.S. 56 (1939); Shields v. Utah Idaho Central R.R., 305 U.S. 177 (1938); Wolf Corp. v. SEC, 317 F.2d 139 (D.C. Cir. 1963); R.A. Holman & Co. v. SEC, 299 F.2d 127 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962). Informal actions of the SEC are reviewable in the district courts under the APA, the Declaratory Judgment Act (28 U.S.C. § 2201 (1970)), or the courts' general jurisdiction (28 U.S.C. § 1337 (1970)). Potomac Fed. Corp. v. SEC, [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,704 (D.D.C. 1974); Independent Broker-Dealers Trade Assoc. v. SEC, 442 F.2d 132 (D.C. Cir.), *cert. denied*, 404 U.S. 828 (1971); First Savings & Loan Ass'n v. SEC, 358 F.2d 358 (5th Cir. 1966); Silver King Mines, Inc. v. Cohen, 261 F. Supp. 666 (D. Utah 1966). SEC rules are unreviewable under section 25(a) in the court of appeals, but are reviewable as final agency action in the district courts under the APA or under the courts' general jurisdiction. 28 U.S.C. § 1337 (1970); *see* PBW Stock Exch. v. SEC, 485 F.2d 718 (3d Cir. 1973), *cert. denied*, 416 U.S. 969 (1974); National Resources Defense Council v. SEC, [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,910 (D.D.C. 1974).

sion.[169] Subsequently, *Kixmiller* transformed the *Medical Committee* dictum into a holding by finding that a staff no-action letter which the commission has refused to reconsider is unreviewable in the court of appeals under section 25(a).[170] In a related development, the same court in *National Automatic Laundry*[171] distinguished between informal advisory opinions signed by the head of an agency, which were ripe for review under the Administrative Procedure Act, and staff advisory opinions, which were not. Finally, *Potomac Federal Corporation* integrated the two lines of cases by holding that staff action letters which the commission has refused to review are unreviewable under the APA.[172]

There is, however, no need to create a rigid distinction between staff and commission action for purposes of judicial review under the APA. Since informal staff action can have serious consequences, it warrants judicial review. The policies behind review of judicial action are better served if the courts apply flexible ripeness standards to staff action. The fact that the informal action sought to be reviewed is staff action rather than action by the head of an agency is admittedly a factor to be considered in determining whether judicial review is appropriate, but it should not be a conclusive factor requiring the court to refuse review.

A. Medical Committee and Kixmiller Do Not Bar Review of Staff Action Under the Administrative Procedure Act

In the framework of the *Medical Committee* analysis, the distinction which the *Kixmiller* court made between the reviewability of staff and commission action under section 25(a) is supportable. As *Kixmiller* emphasized, a staff no-action determination which the SEC refuses to review is not a commission order. Consequently, staff shareholder proposal no-action determinations do not qualify for direct review in the court of appeals under section 25(a) even though no-action determinations by the commission would qualify under the *Medical Committee* analysis.

169. Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 675 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

170. Kixmiller v. SEC, 492 F.2d 641 (D.C. Cir. 1974).

171. National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971). The court stated, "The overwhelming bulk of these [advisory interpretations] are not given by the agency head, and are not within the scope of our ruling announced today." *Id.* at 702.

172. Potomac Fed. Corp. v. SEC, [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,704, at 96,328 (D.C.C. 1974).

The jurisdictional sweep of the APA, however, is not limited to commission orders. Unlike section 25(a), the APA does not require that the commission approve the staff no-action determination on the merits as a precondition for judicial review. Section 10(a) of the APA[173] provides that a person adversely affected or aggrieved by agency action is entitled to judicial review.[174] A staff shareholder proposal no-action determination constitutes agency action.[175] Consequently, the reasoning used in *Kixmiller* to bar review of staff shareholder proposal no-action determinations as orders under section 25(a) does not bar the reviewability of staff no-action determinations under the APA.

B. Ripeness Under the Administrative Procedure Act

The fact that a shareholder proposal no-action determination

173. 5 U.S.C. § 702 (1970).

174. A proposing shareholder has standing to seek judicial review of the no-action determination under section 10 of the APA. The shareholder is within the zone of interest protected by the Securities Exchange Act of 1934, and he has been injured in fact by the SEC no-action determination. *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). The shareholder is injured in fact because he will have to bring an expensive private action against the company in order to vindicate his rights under the SEC proxy rules. As a practical matter, most investors cannot afford to pursue judicial relief and they will abandon their proposals once the SEC refuses to bring an enforcement action against the company. Moreover, the SEC's decision reinforces the company's decision to exclude the proposal, and thus the SEC is partly responsible for the injury to the shareholder's interests. *See* Independent Broker-Dealers' Trade Ass'n v. SEC, 442 F.2d 132, 137 (D.C. Cir. 1971). Realistically, a company's decision to exclude a shareholder's proposal is contingent on SEC acquiesence. For the vast majority of companies, a commission no-action letter is necessary to make the exclusion decision final. *See generally* Schwartz, *The Public Interest Proxy Contest, Reflections on Campaign G.M.*, 69 MICH. L. REV. 419, 434 (1971).

The shareholder is within the zone of interest protected by the Securities Exchange Act of 1934, as the protection of investors is among the express purposes of section 14 (a), the section dealing with proxies. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964); Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 675 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

175. Agency action includes the "whole or a part of an agency rule, order . . . or failure to act." 5 U.S.C. § 551(13) (1970). A shareholder proposal no-action determination qualifies either as an APA order or a failure to act. Section 551(6) of the APA defines an order as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making . . . ." 5 U.S.C. § 551(6) (1970). A shareholder proposal no-action letter states that the agency has studied the company's arguments and intends to take no further action on the matter. Consequently, the no-action determination is a final negative disposition. The no-action determination also constitutes a failure to act.

Potomac Fed. Corp. v. SEC, [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,704 (D.D.C. 1974) held that a staff action letter which the commission considered and sent back to the staff for re-publication constituted final agency action reviewable under the APA.

qualifies as agency action, however, is merely the beginning of the jurisdictional inquiry. A ripeness analysis is required under the APA, for section 10(c) of the act further limits the set of reviewable agency actions to "final agency actions."[176] Moreover, injunctive relief is a discretionary remedy, and courts are reluctant to apply such remedies to administrative actions unless the controversy is ripe for judicial review.[177]

In *Abbott Laboratories v. Gardner*,[178] the Supreme Court presented a methodology for determining whether administrative action is ripe for review under the APA. The question whether a particular action is ripe for review is largely a matter of common sense.[179] On the one hand, the court weighs the fitness of the issues for judicial decision.[180] The concept of fitness for judicial review incorporates (1) finality of agency action,[181] (2) appropriateness of the issues for judicial decision,[182] and (3) the practical impact which judicial review will have on the administrative agency.[183] On the other hand, the court balances the hardship to the complaining party if judicial review is withheld or delayed.[184] In *Medical Committee*, the court stated, "[P]ragmatic considerations, particularly those relating to the institutional relationships between the courts and the administrative agencies, must prevail over purely doctrinal arguments for or against reviewability."[185] If, however, competing considerations are closely balanced, the issue should be resolved in favor of review, for the APA embodies a presumption of judicial review.[186]

C. The General Rule that Staff Action Is Not Ripe

In the leading case of *National Automatic Laundry & Cleaning*

176. 5 U.S.C. § 704 (1970).

177. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967).

178. *Id.*

179. *See* Continental Air Lines, Inc. v. CAB, 522 F.2d 107, 124 (D.C. Cir. 1975).

180. 387 U.S. at 149.

181. *Id.*

182. *Id. See also* National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 695 (D.C. Cir. 1971).

183. Continental Air Lines, Inc. v. CAB, 522 F.2d 107, 125 (D.C. Cir. 1975).

184. 387 U.S. at 148-49. *See also* Continental Air Lines, Inc. v. CAB, 522 F.2d 107, 128 (D.C. Cir. 1975); National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 696 (D.C. Cir. 1971).

185. 432 F.2d at 667.

186. *See* Abbott Labs. v. Gardner, 387 U.S. 134, 140 (1967); Continental Air Lines, Inc. v. CAB, 522 F.2d 107, 128 (D.C. Cir. 1975); National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 694 (D.C. Cir. 1971).

Council v. Shultz,[187] the District of Columbia Circuit held that an informal interpretive letter signed by the head of an agency is presumptively authoritative and thus final for purposes of review.[188] In that particular case, the letter was a definitive statement of the agency's position which was entitled to judicial deference if a private court action were brought.[189] The court noted that staff interpretive letters do not constitute final agency action; they have no legal significance in a private action and are not definitive statements of the agency's position because they may be overturned by the head of the agency.[190]

In *Potomac Federal Corporation v. SEC*,[191] the court held that an SEC action letter was reviewable as final agency action under section 25(a). The opinion carefully notes, however, that staff action letters are unreviewable in the courts if the commission refused to reconsider the staff determination.[192] The court cited *Kixmiller* for this conclusion without explaining why staff action is not ripe for review under the APA as opposed to section 25(a).[193]

Finally, *Koss v. SEC*[194] applied ripeness principles to preclude review of a staff opinion letter under the APA. In *Koss*, the SEC staff sent letters of comment to issuers employing the plaintiff's services as underwriter, stating that their offering circulars would have to be revised to disclose that the plaintiff was under investigation by the SEC. After the plaintiff filed suit, the commission rescinded the staff's comment letter. The chief of the branch of small issues in the division of corporate finance wrote the plaintiff that disclosure of the SEC investigation would not be required in subsequent offering circulars distributed by the plaintiff's clients. However, the plaintiff would be requested by the appropriate regional SEC offices to inform any issuer of a Regulation A[195] offering which plaintiff was underwriting that he was under investigation and that if he were suspended by the SEC, the issuer's Regulation A registration might be forfeited. The district court dismissed the action on the ground that staff letters of comment were not ripe for review. The staff's comments did not represent the

187. 443 F.2d 689 (D.C. Cir. 1971).
188. *Id.* at 701.
189. *Id.* at 697, 702.
190. *Id.* at 699-702.
191. [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,704 (D.D.C. 1974).
192. *Id.* at 96,328.
193. *Id.*
194. 364 F. Supp. 1321 (S.D.N.Y. 1973).
195. 17 C.F.R. §§ 230.251-.263 (1976).

opinion of the commission and thus stopped far short of an actual threat of SEC enforcement. Moreover, the commission did not appear to be reluctant to oversee the staff's activities. In particular, the fact that the commission had rescinded the staff's initial letter of comment demonstrated that the staff's opinion letters were not definitive.

The three courts are agreed that informal staff actions are not ripe for direct review. *Potomac Federal Corporation* states flatly that staff action is unreviewable unless the head of an agency decides first to review the staff action.[196] However, no persuasive reasons were advanced as to why district courts should not apply ripeness criteria to determine whether the practical consequences of informal staff action are sufficiently serious to warrant direct review.

D. The Fact that the Action Sought To Be Reviewed Is Staff Action Should Not Preclude Review

National Automatic Laundry & Cleaning Council v. Schultz[197] cited three reasons why staff action is not ripe for review. First, staff opinions, unlike opinions signed by the head of an agency have no legal effect.[198] Second, staff opinions are not authoritative and are subject to reversal by the head of an agency.[199] Third, subjecting staff opinions to judicial review might prompt the agencies to restrict the availability of informal advice.[200] Although the reasons outlined above should be considered by a court in determining whether a particular staff action should be reviewed, they are not sufficient in themselves to preclude judicial review of all informal staff actions. In particular, staff shareholder proposal no-action letters which the commission refuses to review are ripe for review under the Administrative Procedure Act.

1. The Legal Effect Argument

The fact that an opinion signed by the head of an agency is entitled to deference from the courts is a persuasive reason for reviewing the opinion. This should not mean, however, that staff opinions are necessarily unreviewable because they lack the same legal impact.

196. [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,704 (D.D.C. 1974).
197. 443 F.2d 689 (D.C. Cir. 1971).
198. *Id.* at 697.
199. *Id.* at 700.
200. *Id.* at 669-700.

In *Continental Air Lines, Inc. v. CAB*,[201] the District of Columbia Circuit specifically stated that informal actions may be reviewable even though the action is never to have any formal legal effect.[202] The important consideration is the *practical* effect which the action will have.[203] Legal consequences are only one of the many types of practical effects an administrative action may have. In *Koss*,[204] the practical effect of the SEC's requesting the plaintiff to inform issuers employing his services that he was under investigation was that he would lose business. The plaintiff was entitled to some form of judicial review of the staff action before he lost his livelihood. In the case of the shareholder proposal no-action letter, the practical effect of a decision to issue a no-action letter made at the staff level is equivalent to that made at the commission level: the shareholder is deprived of agency assistance.

2. The Need for an Authoritative Agency Ruling

The *National Automatic Laundry* court indicated that there were two aspects to the authoritative agency ruling requirement. The first aspect was that the ruling must be the final or ultimate expression of the office or agency on the matter.[205] The court observed that the requirement of an authoritative ruling was akin to the doctrine of exhaustion of administrative remedies.[206] The second aspect of the authoritative determination requirement was that the action must be a final rather than a tentative position.[207] The court might refuse to review an action which was taken by the head of an agency if the agency presented evidence that the matter was still under meaningful refinement and development.[208]

The exhaustion doctrine requires that the plaintiff pursue his administrative remedies before bringing an action for direct review. There is no danger, however, of the court prematurely interfering with the administrative process after the plaintiff has sought and been denied review of the staff action by the head of the agency. The agency's consideration of the matter at this point will have ended. Once the highest authority in an agency refuses to review staff action,

201. 522 F.2d 107 (D.C. Cir. 1975).
202. *Id.* at 124.
203. *See id.* at 124 & n.5.
204. Koss v. SEC, 364 F. Supp. 1321 (S.D.N.Y. 1973).
205. 443 F.2d 689, 700 (D.C. Cir. 1971).
206. *Id.*
207. *Id.* at 700-01.
208. *Id.* at 701-03.

the staff action should be treated as the agency's action for purposes of direct review.

As far as the need for a settled action goes, there is no inherent reason why staff action which the head of an agency has refused to review should be considered tentative. In many instances, the staff action may consist of applying established law to particular facts. When the head of the agency refuses to review the staff action, the staff action is dispositive of the issue. Moreover, as the court noted in *New York Stock Exchange, Inc. v. Smith*,[209] an opinion letter signed by the head of an agency is presumptively final for purposes of review even though it could be reconsidered by the agency at any time.[210] Similarly, once the head of an agency has refused to review a staff action, the staff action should be considered presumptively final even though the official agency position on the matter might shift at a later date. In any event, if the staff action is tentative, the agency is free to bring that fact to the attention of the court.

3. *The Argument that Review of Staff Action Might Result in a Cut-Back in Agency Advice*

The extension of direct review to informal staff action would be counterproductive if the agencies responded by cutting back on the availability of informal advice. There is no reason to believe, however, that direct judicial review of informal staff action would bring about such a result. First, the courts will be selective in applying ripeness criteria to staff action. Since staff advice does not command deference in the courts, the courts will demand a greater showing of need on the part of the plaintiff before allowing direct review. Direct review will be reserved for those instances where the case of such review of staff action is particularly compelling. Second and more important, the courts can take affirmative steps to ensure that informal advice is available. There is a developing body of case law requiring administrators to give reasons for their actions.[211] Similarly, a reviewing court can require an agency to provide reasons why it refused to give informal advice to a plaintiff who is affected by the law which the agency

209. 404 F. Supp. 1091 (D.D.C. 1975).

210. *Id.* at 1094.

211. In one case, the Supreme Court held that the Secretary of Labor was required to provide the court with a statement of reasons why he refused to bring a civil action to set aside a labor election. Dunlop v. Bachowski, 421 U.S. 560 (1975). See text accompanying notes 223-27 *infra*.

administers.[212] If the court is dissatisfied with the agency's reasons, it can order the agency to provide an advisory opinion.

In summary, the courts should not automatically refuse to review informal staff action under the APA. Rather, the courts should apply the *Abbott Laboratories* ripeness tests with particular sensitivity to the practical impact the staff action has on the aggrieved party.

IV. The Legal Basis for Direct Review of Staff No-Action Determinations Under the Administrative Procedure Act

Section 10(a) of the Administrative Procedure Act[213] provides that a person adversely affected or aggrieved by agency action is entitled to judicial review.[214] This broad grant is narrowed by the introductory clause of section 10(a) which excludes judicial review where a relevant statute precludes judicial review or where action is committed to agency discretion by law.[215] A number of recent cases have held that district courts have subject matter jurisdiction to review informal SEC action under the APA.[216] Because these cases have found that section 25(a) of the Securities Exchange Act does not preclude review under the APA, the first exception contained in the introductory clause to 10(a) is not applicable here. The second exception, however, requires further discussion.

A. Agency Action Committed to Agency Discretion by Law

The District of Columbia Circuit in *Kixmiller* observed that section 21(a) of the Securities Exchange Act[217] grants the SEC unreviewable discretion to undertake investigations and to bring enforcement actions.[218] From this the court concludes that a no-action letter is unreviewable under the APA because it is agency action com-

212. 421 U.S. at 571-72. *See generally*, Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971).

213. 5 U.S.C. § 702 (1970).

214. A shareholder proposal no-action determination qualifies as agency action. See note 175 *supra*.

215. 5 U.S.C. § 701(a)(1), (2) (1970).

216. *See* Independent Broker-Dealers Trade Assoc. v. SEC, 442 F.2d 132 (D.C. Cir. 1971); National Resources Def. Council, Inc. v. SEC, [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,910 (D.D.C. 1974); Potomac Fed. Corp. v. SEC, [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,704 (D.D.C. 1974); Koss v. SEC, 364 F. Supp. 1321 (S.D.N.Y. 1973) (court had subject matter jurisdiction but staff no-action determination was not ripe).

217. 15 U.S.C. § 78u(a) (Supp. V, 1975), *amending* 15 U.S.C. § 78u(a) (1970).

218. 492 F.2d at 645.

mitted to agency discretion by law.[219] In fact, in the *Kixmiller* and *Medical Committee* cases, the SEC had not exercised prosecutorial discretion. There was no need to make an enforcement decision because the staff agreed with the company's legal reasons for refusing to include the shareholder's proposal.[220] True prosecutorial discretion only comes into play if the commission, finding that the shareholder's proposal should be included, issues a deficiency letter with which the company refuses to comply.[221] In the rare instances when this happens, the SEC must then engage in a cost-benefit analysis regarding the value of bringing an enforcement action in the courts. There is no reason why a court should refuse to review a no-action determination if such discretionary factors were not exercised.

Even the discretionary aspects of a prosecutorial decision are subject to limited judicial review under the APA.[222] In *Dunlop v. Bachowski*,[223] Walter Bachowski, a candidate for office in a labor union, filed a complaint with the Department of Labor alleging numerous election irregularities, violation of the union constitution, and violation of the Labor-Management Reporting and Disclosure Act of 1959. Following an investigation of the complaint, the secretary of labor notified Bachowski that he had decided not to bring an action to set aside the election. Bachowski then filed an action against the secretary in which he charged that the investigation had substantiated the charges of election irregularities. The complaint concluded that the refusal of the secretary to take action to set aside the election was arbitrary and capricious. The court was asked to direct the secretary to file a civil action to set aside the election.

219. "An agency's decision to refrain from an investigation or an enforcement action is generally unreviewable and, as to the agency before us, the specifications of the Act leave no doubt on that score." 492 F.2d at 645.

220. 492 F.2d at 643 n.8; 432 F.2d at 679 & n.27.

The Supreme Court has said that the "committed to agency discretion" exception is to be applied narrowly. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

221. An SEC opinion letter stating that the proposals must be included is not a commitment of agency enforcement. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign G.M.*, 69 MICH. L. REV. 419, 432 (1971).

222. *See* Dunlop v. Bachowski, 421 U.S. 560 (1975); Nader v. Saxbe, 497 F.2d 676, 679 (D.C. Cir. 1974) (prosecutorial policies are reviewable); Hodgson v. Machinists Lodge 851, 454 F.2d 545, 552 (7th Cir. 1971); Trailways of New England, Inc. v. CAB, 412 F.2d 926, 931-32 (1st Cir. 1969); Wong Wing Hang v. Immigration & Nat. Serv., 360 F.2d 715, 717 (2d Cir. 1966); Brennan v. Connecticut UAW Council, 373 F. Supp. 286, 287 n.1 (D. Conn. 1974); De Vito v. Shultz, 300 F. Supp. 381, 382 (D.D.C. 1969); Schonfield v. Wirtz, 258 F. Supp. 705, 708 (S.D.N.Y. 1966); *cf.* Leedom v. Kyne, 358 U.S. 184 (1958); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

223. 421 U.S. 560 (1975).

The Supreme Court rejected the secretary's claim that his exercise of prosecutorial discretion was immune from review under section 10(a) of the Administrative Procedure Act.[224] The Court held that the secretary's decision not to bring suit was subject to limited review under section 10(e) of the APA.[225] Section 10(e) of the APA authorizes a district court to set aside agency action found to be "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law."[226] To enable the reviewing court to review intelligibly the secretary's determination, the secretary was required to provide the court and the complaining witness with copies of a statement of reasons supporting his determination.[227] To prevent the reviewing court from substituting its judgment for that of the secretary, the Supreme Court directed that the plaintiff would not be permitted to attack the factual bases for the secretary's conclusions in his statement of reasons..[228]

The *Bachowski* decision authorizes limited judicial review of the discretionary aspect of shareholder proposal no-action determinations.[229] Because the SEC reviews a large number of shareholder proposals each year, it is unlikely that a court will find that the SEC has acted arbitrarily or capriciously in refusing to bring an enforcement action in a given case.[230] However, the SEC's decision to issue a no-action letter in the face of a violation of the proxy rules can be attacked as an abuse of discretion, as the commission has no authority to waive violations of the Securities Exchange Act.[231]

224. *Id.* at 567-68.

225. *Id.* at 568.

226. 5 U.S.C. § 706(2)(A) (1970).

227. 421 U.S. at 571.

228. *Id.* at 572-73.

229. *See* Littell v. Morton, 445 F.2d 1207, 1210-14 (4th Cir. 1971); Scanwell Labs. v. Shaffer, 424 F.2d 859, 874 (D.C. Cir. 1970); Trailways of New England, Inc. v. CAB, 412 F.2d 926, 931-33 (1st Cir. 1969); Suwannee S.S. Co. v. United States, 354 F. Supp. 1361, 1368-69 (1973); *cf.* Reece v. United States, 455 F.2d 240, 242 (9th Cir. 1972). *See generally* JAFFE, *supra* note 82, at 374-75.

230. One suggested improvement in SEC procedure would be a requirement that the SEC express its disapproval of a company's decision to exclude a shareholder's proposal by issuing a negative letter of comment coupled with a refusal to issue a no-action letter. The SEC's current practice when a filing is deficient is to send a letter to the person who filed the document bringing the deficiency to his attention and allowing opportunity for the deficiency to be corrected. *See* 17 C.F.R. § 202.3(a) (1976). The practical effect of a negative letter of comment is enormous, since most companies will voluntarily comply with the SEC's interpretation of the proxy rules to avoid antagonizing the agency. *See* Schwartz, *The Public Interest Proxy Contest: Reflections on Campaign G.M.*, 69 MICH. L. REV. 419, 434 (1971).

231. *See* Capital Funds, Inc. v. SEC, 348 F.2d 582, 588 (8th Cir. 1965); SEC v. Morgan, Lewis & Bockius, 209 F.2d 44, 49 (3d Cir. 1953).

In summary, if the SEC sides with the company on its interpretation of the law, the court has jurisdiction under the APA to review the alleged error of law. Prosecutorial discretion is not involved in the no-action determination. On the other hand, where the shareholder alleges that the SEC uncovered a violation of the proxy rules but nonetheless issued a no-action letter, the court has jurisdiction to determine whether the agency abused its discretion by issuing a no-action letter and by refusing to bring an enforcement action.

B. Application of the Abbott Laboratory Methodology to Staff No-Action Determinations

As stated earlier,[232] agency action must be final or ripe for review before the courts will examine it under the Administrative Procedure Act. *Abbott Laboratories* is the leading case on ripeness, and an application of the *Abbott* methodology to shareholder proposal no-action determinations by the SEC staff shows that such determinations qualify as "final staff action" under the APA. This methodology entails balancing the fitness of the issues for judicial review with the hardship on the complaining party if judicial review is refused.

1. Fitness for Judicial Review

a. The Appropriateness of the Issues for Judicial Resolution

The issues involved in a shareholder proposal dispute are well suited for judicial resolution.[233] The shareholder typically is contesting a limited number of legal issues which have been fully developed before the SEC. In most cases, the reviewing court will be able to decide the case on briefs alone.

b. Finality of Agency Action

The exhaustion doctrine requires that the shareholder appeal a staff no-action determination to the commission before bringing an action for direct review.[234] If the commission decides to review the staff no-action determination, the ensuing commission no-action determination is reviewable. If the commission refuses to review the staff no-action determination, as it did in *Kixmiller*, then the agency

232. See notes 176-86 & accompanying text *supra*.

233. Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967); National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 695 (D.C. Cir. 1971).

234. *See No Action Decisions, supra* note 76, at 865. *See generally* 3 DAVIS, *supra* note 6, ch. 20.

processes have come to an end. There is no danger that the court will intervene in the dispute while the agency is still in the process of deciding whether it will bring an enforcement action.[235]

Once the commission refuses to review the staff no-action determination, the no-action determination can be considered "commission action" for purposes of review under the literal language of a little explored amendment to the Securities Exchange Act. Section 3 of the Securities Acts Amendments of 1975[236] authorizes the SEC to delegate its powers to the staff by published order or rule. If the commission exercises its discretion not to review a determination made pursuant to the delegated powers, the amendment provides that the staff action shall for all purposes, "including appeal or review thereof, be deemed the action of the Commission."[237]

The commission has promulgated specific rules in which it formally delegates authority to particular officers of the SEC pursuant to section 78d-1 of the act.[238] For example, the chief of the division of corporate finance has been delegated power to accelerate the effective date of registration statements.[239] Section 78d-1(c), however, does not require an explicit statement that a delegation of authority is being made pursuant to section 78d-1 of the act. It can be argued that for purposes of review, a general delegation of responsibility to the SEC staff is sufficient for the review provisions of section 78d-1 to apply. The handling of proxy filings is delegated to the division of corporate finance.[240] Under section 78d-1(c), this could be deemed the action of the commission for review purposes. As constructive commission action, the staff shareholder proposal no-action determination would be ripe for review under the Administrative Procedure Act.

There is no reason for the courts to refrain from reviewing staff shareholder proposal no-action letters on the ground that they are tenta-

235. *See* Port of Boston M.T. Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 71 (1970); National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 701 (D.C. Cir. 1971).

236. 15 U.S.C. § 78d-1(a) (Supp. V, 1975), *amending* 15 U.S.C. § 78d-1(a) (1970).

237. "Should the right to exercise such review be declined, or should no such review be sought within the time stated in the rules promulgated by the Commission, then the action of any such division of the Commission . . . or employee board . . . shall, *for all purposes, including appeal or review thereof, be deemed the action of the Commission.*" 15 U.S.C. § 78d-1(c) (1970) (emphasis added).

238. *See* 15 U.S.C. § 78d-1 (1970).

239. 17 C.F.R. § 200.30-1(a)(5)(i) (1976).

240. *Id.* § 202.3(a) (1976).

tive or subject to reconsideration.[241] The shareholder's interests are harmed as much by a staff no-action recommendation which the commission has refused to review as they are by a commission affirmation on the merits.[242] The practical effects of the no-action decision are final, as the proposal is omitted from the upcoming annual shareholders' meeting.

c. Practical Impact on the SEC of Direct Review of Staff No-Action Determinations

The costs of permitting direct review are minimal, for the number of suits which will be brought against the SEC for review of shareholder proposal no-action determinations will be small. First, only a fraction of the proxy materials filed each year involve an attempt by management to exclude a shareholder's proposal.[243] Second, the most common grounds for issuing shareholder proposal no-action letters include failure to submit a proposal by the proxy deadlines[244] and failure to include the required statement that the shareholder will be present at the shareholders' meeting to introduce his proposal.[245] Finally, a private action against the company is probably more attractive to shareholders who can afford to litigate, since they can obtain immediate injunctive relief against the company. An action for direct review of a no-action determination is an indirect method of accomplishing what a private action can do directly.[246]

As explained earlier, one reason the courts have been conservative in affording direct review of informal agency action is the fear that administrative agencies would restrict the issuance of advisory letters to avoid potential litigation.[247] This fear is unjustified in the case of shareholder proposal no-action letters. The amount of energy which

241. As a practical matter, the commission honors no-action commitments made by its staff, particularly where the commission declines to review the staff action. *See* 3 Loss, *supra* note 11, at 1843-44; Lockhart, *supra* note 97, at 96.

242. *See No Action Decisions, supra* note 76, at 864.

243. Records indicate that 6,757 proxy statements in definitive form were filed with the SEC in fiscal 1974. Only 161 proposals submitted by 78 stockholders of 71 companies were omitted. 434 proposals submitted by 69 stockholders of 227 companies were included. 40 SEC ANN. REP. 33 (1974).

244. *Id.*

245. 39 SEC ANN. REP. 37 (1973).

246. See notes 255-59 & accompanying text *infra.*

247. "To permit suits for declaratory judgments upon mere informal, advisory, administrative opinions might well discourage the practice of giving such opinions, with a net loss of far greater proportions to the average citizen than any possible gain which could accrue." Helco Prods. v. McNutt, 137 F.2d 681, 684 (D.C. Cir. 1943).

the SEC would have to expend in responding to shareholder suits under the APA would be negligible. The number of cases would be small and the vast majority of these challenges would be strictly legal in nature and thus could be resolved by the submission of briefs. Direct review of staff shareholder proposal no-action letters would not result in long drawn-out trials. Also, the SEC cannot cut back on the availability of shareholder proposal no-action letters. The SEC must make a decision whenever management seeks to omit a shareholder proposal.[248] As long as the proxy rules allow management to omit certain types of shareholder proposals, the SEC will have to police companies to ensure that the omissions are within the exceptions to the general rule that shareholder proposals must be included in management's proxy materials.

Finally, if the SEC wished to lessen the burden of direct review attributable to shareholder proposal no-action decisions, it could adopt a policy that no-action letters would be issued only in cases where management had a clear-cut right to omit the proposal. This, of course, would mean fewer no-action decisions from which shareholders could appeal.

2. *Hardship to the Parties*

In considering the hardship to the proposing shareholder if judicial review is withheld, the court was faced with a different problem in the shareholder proposal no-action cases than it was in *Abbott Laboratories*,[249] *National Automatic Laundry*,[250] or *Potomac Federal Corporation*.[251] In those cases, the court considered whether the burden on the plaintiff was sufficiently great to justify pre-enforcement review of

248. In its Statement of Informal Procedures, the SEC asserts that the commission and its staff are not required to respond to management's submission in shareholder proposals. The agency position is that it provides no-action letters as a matter of convenience. Statement of Informal Procedures for the Rendering of Staff Advice With Respect to Shareholder Proposals, (July 7, 1976) [Current] CCH FED. SEC. L. REP. ¶ 80,635, at 86,605. This important fact for purposes of direct review, however, is that the agency has issued a no-action letter, not whether the agency was required to do so. Moreover, even if the SEC does not have to reveal its enforcement decision, the agency still has to decide whether it will bring an action for injunctive relief at the time management indicates that it intends to omit the shareholder's proposal. The decision not to intervene in the shareholder's behalf is judicially reviewable even if the agency fails to advise management that it intends to take no action if the proposal is omitted.

249. 387 U.S. 136 (1967).

250. 443 F.2d 689 (D.C. Cir. 1971).

251. [1974-1975 Transfer Binder] CCH FED. SEC. L. REP. ¶ 94,704 (D.D.C. 1974).

the agency action. Even if the court had dismissed the pending suit, the plaintiff would have been able to challenge the agency's action when the agency initiated an enforcement proceeding. In contrast, in the shareholder proposal no-action situation, the issue is not when the shareholder will be afforded judicial review; the issue is whether the shareholder can obtain direct judicial review at all. In *New York Stock Exchange, Inc. v. Smith*,[252] the court observed that the case for direct review was stronger where the complaining party would never have an opportunity to challenge administrative action by disobeying it. This reasoning applies in the case of shareholder proposal no-action letters.

On the other hand, a denial of judicial review will not harm the shareholder's private cause of action. The assumption in *Medical Committee* that a shareholder proposal no-action determination by the SEC itself impairs a shareholder's private action cannot be used to justify direct review of staff determinations. While it has been argued that a commission no-action determination should have no impact on the shareholder's private action against the company,[253] it is generally agreed that a staff no-action determination is definitely limited in impact to its persuasive value and consequently cannot contaminate the shareholder's private action.[254]

Moreover, the *Medical Committee* argument that the private action is inadequate to enforce a shareholder's rights under the proxy rules is of doubtful validity. *Rafal v. Geneen*[255] provides an example of how effective a private action can be in protecting a shareholder's rights. There, a district court acted to pass on the legality of proxies which were solicited for use at a shareholders' meeting which was to be held two days later. The court found that the proxy materials omitted material facts concerning candidates for corporate office. Proxies obtained for the election of the three candidates involved were voided, and the election to fill three positions on the board of directors was enjoined pending a resolicitation of proxies through "fair and truthful proxy materials."[256] Similarly, in a shareholder's private action to compel a company to include his proposal in its proxy materials, a district court could order management to amend and recirculate its proxy materials, to call a special shareholder's meeting to consider the pro-

252. 404 F. Supp. 1091, 1095 (D.D.C. 1975).

253. See notes 99-107 & accompanying text *supra*.

254. Spirt v. Bechtel, 232 F.2d 241 (2d Cir. 1956).

255. [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,505, at 92,440 (E.D. Pa. 1972).

256. *Id.* at 92,443.

posal, or to canvas the company's shareholders by mail concerning the proposal.[257]

Compared to a private action against a company, direct review of an SEC no-action determination is at best an indirect method for compelling the company to include a shareholder's proposal.[258] Even if the SEC loses the suit brought against it by the shareholder, it can still decline to bring an enforcement action against management on discretionary grounds. On the other hand, if the SEC decides to bring an enforcement action, the shareholder will have the benefit of SEC assistance, but a second suit may still have to be brought to force management to include the proposal in its proxy materials.[259]

Although the private action is an adequate alternative to an action for direct review as far as the individual shareholder is concerned, there are a number of reasons why direct review is desirable. Allowing a right of direct review has the advantage of keeping the SEC responsive to the needs of proposing shareholders.[260] The primary and explicit purpose of section 14(a) of the Securities Exchange Act is the protection of investors, and Congress intended that the purposes of the act should be carried out by commission regulation of proxy statements rather than through private actions by individual security holders.[261] Moreover, the only practicable way for most investors to contest management's decision to exclude their proposals is through the SEC's proxy procedures.[262] Small investors cannot afford to litigate their claims. Since the SEC proxy review procedure serves as the guardian

257. In its Proposed Amendments to the shareholder proposal rules, the SEC proposes to extend the deadlines for management to submit its reasons for omitting a shareholder proposal from thirty days before the meeting to fifty. This is to give the shareholder more time to bring a private action. Proposed Amendments to Rule 14a-8 Under the SEC Act of 1934 Relating to Proposals by Security Holders, [Current] CCH FED. SEC. L. REP. ¶ 80,634, at 86,596 (1976).

258. *See Judicial Review of SEC, supra* note 39, at 340-41.

259. If the SEC decides to bring an enforcement action against the company and the company capitulates, it may be too late to include the shareholder proposal owing to the time factors involved in bringing an action against the SEC. If the shareholder's meeting has already been held, the best the shareholder can hope for is inclusion of his proposal in the following year's proxy materials. The shareholder's private action promises faster and more effective relief because the district court can decide the legal issues involved in most proxy disputes on a motion for summary judgment and can then grant injunctive relief against the company as in Rafal v. Geneen, [1972-1973 Transfer Binder] CCH FED. SEC. L. REP. ¶ 93,505 (E.D. Pa. 1972).

260. *See No-Action Decisions, supra* note 76, at 856-57.

261. Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 672 (D.C. Cir. 1970).

262. *Id.*

of the rights of small investors, it is essential that the SEC consider carefully the materials filed with it, resolving disputes between shareholder and management in accordance with an accurate perception of the congressional intent underlying the proxy provisions of the Securities Exchange Act.[263] Direct review is the most effective way to ensure that the SEC properly performs its duties under the act. A private action against a company has no effect on the SEC. In a private action, the process by which the agency arrived at its no-action determination cannot be scrutinized.[264] Consequently, the courts should permit shareholders the option to obtain judicial review of the no-action determination so that they can protect their personal rights under the proxy rules and enhance the integrity of the proxy review process in one action.

Eliminating a right of direct review of staff shareholder proposal no-action letters on the ground that there is an adequate remedy subverts the reasoning which motivated the Supreme Court's recognition of an implied private right of action for proxy violations. In *J.I. Case Co. v. Borak*,[265] the Court held that a private action could be brought by a shareholder to set aside a merger accomplished through the circulation of a false and misleading proxy statement. The Court found that among the chief purposes of the proxy provisions of the Securities Exchange Act is the protection of investors, which implied the availability of a private remedy where necessary to achieve that result.[266] The Court explained that private enforcement of the proxy rules provided a necessary supplement to commission action and served as an effective weapon in the enforcement of proxy rules.[267] In the shareholder proposal no-action situation, the threat to the shareholder's rights under the proxy provisions of the act comes not only from the company, but also from the SEC staff, which may have misapplied the law. Just as section 14(a) supports an implied private action to protect the investor against management's actions, it also supports direct review of SEC practices and interpretations of the proxy rules when necessary to protect investors.[268] The District of Columbia Circuit in *Medical Committee* justified judicial supervision of the proxy process by noting that a published study had accused the SEC of a variety of procedural

263. *Id.*

264. *See No-Action Decisions, supra* note 76, at 855.

265. 377 U.S. 426 (1964).

266. *Id.* at 431-32.

267. *Id.* at 432.

268. Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 675-76 (D.C. Cir. 1970).

sins in its regulation of proxies, most of which could be curtailed or eliminated through judicial review.[269] It would be ironic if the implied private action which the Supreme Court recognized as a valuable supplement to the SEC's efforts to protect investors' rights under the proxy rules could be used to justify the denial of a right to direct review of SEC staff no-action determinations under the Administrative Procedure Act.

Finally, the SEC's decision to issue a no-action letter independently injures the shareholder. When management submits its arguments for excluding the shareholder's proposal, its action is tentative, subject to reconsideration if the SEC refuses to issue a no-action letter. The SEC's no-action decision solidifies the company's decision to exclude the proposal.[270] Under this view, the SEC is an independent wrongdoer. In *Independent Broker-Dealer Trade Association v. SEC*,[271] the District of Columbia Circuit held that an informal letter from the chairman of the SEC to the New York Stock Exchange was reviewable because the agency was

> significantly involved in the Exchange's decision to prohibit give-ups, and involved in a way and to an extent that cannot be ignored as devoid of legal materiality. That involvement of a government agency is meaningful enough to call for application of vital principles of judicial review, to consider appellants' claim that action was not lawfully taken.[272]

By analogy to *Independent Broker-Dealer Trade Association*, the role that the SEC plays in solidifying management's decision to omit the shareholder's proposal means that the agency is significantly involved in the company's decision. The fact that the agency is partially responsible for the exclusion of the shareholder's proposal should entitle the shareholder to seek redress against the SEC regardless of the adequacy of a possible private suit against the company.

V. Conclusion

The principles which will govern direct judicial review of informal administrative action are in the formative stage. The courts, however,

269. *Id.* at 674.

270. The SEC virtually concedes this point in its Proposed Amendments where it states that managements delay the printing of proxy materials until they receive the staff's views despite the fact that there is no requirement that management adhere to the staff's views. Proposed Amendments to Rule 14a-8 Under the SEC Act of 1934 Relating to Proposals by Security Holders, CCH FED. SEC. L. REP. ¶ 80,634, at 86,596 (1976). See note 232 & accompanying text *supra*.

271. 442 F.2d 132 (D.C. Cir. 1971).

272. *Id.* at 137.

have made two false starts which should be corrected to improve the effectiveness of direct judicial review and to broaden the jurisdiction of the courts to protect the public against arbitrary informal staff action.

First, the District of Columbia Circuit erred in *Medical Committee* by permitting direct judicial review of informal action in the court of appeals under a statutory review provision designed for the review of formal quasi-judicial orders. Practical and theoretical considerations favor review of informal administrative actions in the district courts under the Administrative Procedure Act. Although *Medical Committee* itself has been rendered moot, the way is open for another court to use the *Medical Committee* analysis to justify review of informal administrative action in the court of appeals under one of the many statutory review provisions similar to that contained in the Securities Exchange Act.

Second, the courts have made a major mistake in automatically precluding direct judicial review of informal staff action. In particular, staff shareholder proposal no-action letters which the SEC refuses to review provide a perfect example of informal staff action which is ripe for direct judicial review under the APA. The courts should apply a flexible ripeness analysis which emphasizes the practical effects of the informal administrative action on the complaining party rather than the level at which the action was taken. Direct judicial review should be available where the head of an agency refuses to review informal staff action and the practical detriment imposed on the plaintiff outweighs the costs to the agency.

Alternatively, it has been suggested that the proper vehicle for reviewing all shareholder proposal no-action determinations is the Administrative Procedure Act. Such a method of review, it has been contended, would help bring this important area of administrative law into line with principles of common sense and simplicity. The APA, with its extensive body of interpretive case law, is well suited for solving the problems faced by the court of appeals in the *Medical Committee* case.